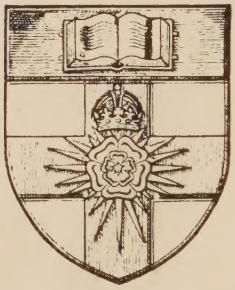
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

REFERENCE ONLY

346.4 Mx North.



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/irish-reports_1922_2

THE IRISH REPORTS.

1922—Vol. II.

IRISH REPORTS 1894-

REPRINT 1976

Printed and Published
in Great Britain by
Professional Books Limited,
of Milton Trading Estate,
Milton, Abingdon, Oxon.

PROFESSIONAL BOOKS LIMITED

THE IRISH REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE KING'S BENCH DIVISIONS

OF

THE HIGH COURTS OF JUSTICE

IN SOUTHERN AND IN NORTHERN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURTS OF APPEAL

IN SOUTHERN AND IN NORTHERN IRELAND,

AND IN

THE HIGH COURT OF APPEAL FOR IRELAND.

EDITED BY

T. HENRY MAXWELL,

ONE OF HIS MAJESTY'S COUNSEL.

1922.

VOL. II.

KING'S BENCH DIVISIONS.

DUBLIN:

PUBLISHED BY THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

1922.

BIBL. LONDIN. UNIV.

DUBLIN:

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

At the University Press,

BY PONSONBY AND GIBBS.

Lord Chancellor.

THE RIGHT HON. SIR JOHN ROSS, BART.

Lords Justices of Appeal.

(IN SOUTHERN IRELAND.)

THE RIGHT HON. STEPHEN RONAN.

THE RIGHT HON. JAMES O'CONNOR.

(IN NORTHERN IRELAND.)

THE RIGHT HON. WILLIAM MOORE.

THE HON. JAMES ANDREWS.

King's Bench Division.

(IN SOUTHERN IRELAND.)

THE RIGHT HON. THOMAS FRANCIS MOLONY, C.J. (Ir.)

THE RIGHT HON. WILLIAM HOUSTON DODD.

THE RIGHT HON. JONATHAN PIM.

THE RIGHT HON. JOHN GORDON.

THE RIGHT HON. ARTHUR WARREN SAMUELS.

(IN NORTHERN IRELAND.)

THE RIGHT HON. SIR DENIS STANISLAUS HENRY, BART., C.J.

THE RIGHT HON. THOMAS WALTERS BROWN.

Law Officer.

(IN SOUTHERN IRELAND.)

HUGH KENNEDY K.C.

Attorney-General.

(IN NORTHERN IRELAND.)

THE RIGHT HON. RICHARD BEST K.C.

[These Reports will be cited as follows :—[1922] 2 I. R.]

REPORTERS.

Court of Appeal,	C. Lehane, Hugh J. M'Cann,	Barristers-at-Law.
King's Bench Division (Nisi Prius and Probate),	T. C. Tobias, Hector Hughes,	Barristers-at-law.
King's Bench Division (Bankruptcy),	C. Norman Kough,	Barrister-at-Law.
Courts in Northern Ireland,	M. G. Ellison,	Barrister-at-Law.

ERRATUM.

p. 164, line 6, for " Vict." read " Edw. 7.'

MEMORANDA.

The High Court of Appeal for Ireland established under the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), first sat on 15th December, 1921, and last sat on 5th December, 1922.

The Right Hon. John Gordon, Justice of the High Court of Justice, King's Bench Division, died on 26th September, 1922.

The Right Hon. Denis Stanislaus Henry, Lord Chief Justice of Northern Ireland, was created a Baronet on the 2nd day of December, 1922.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Anderson, Commissioners of Valuation *v.* 202
Antrim County Council, Postmaster-General *v.* 12
Armagh County Council, Leyburn *v.* 15
Armagh County Council, Leyburn *v.* (No. 2) 58
Armagh County Council, M'Knight *v.* 137
Armagh County Council, Smyth *v.* 137
Atkins *v.* Thompson 102

B.

Bell *v.* Bell 103, 152
Boggan *v.* Motor Union Insurance Co. 184, 222
Bradfield, In the Goods of 213

C.

Comerton and the Local Government Board for Ireland, R. (Corporation of Limerick) *v.* 76, 78
Cooper *v.* General Accident Assurance Corporation 38, 43, 45, 214
Crean & Son, Limited, *v.* M'Millan 105

D.

Dunbar-Buller, *In re* 204

F.

PAGE

Flynn, Wycherly *v.* 28, 32, 169

G.

Gaston, *In re* 179
General Accident Assurance Corporation, Cooper *v.* 38, 43, 45, 214
Geoghegan *v.* Henry 1

H.

Henry, Geoghegan *v.* 1
Hoban, Russell and Baird, Ltd., *v.* 159

K.

Keane, *In re* 198 221
Kelly *v.* Woolworth 5
Kilmartin, Syron *v.* 164

L.

Leyburn *v.* Armagh County Council 15
Leyburn *v.* Armagh County Council (No. 2) 58
Local Government Board for Ireland and Comerton, R. (Limerick Corporation) *v.* 76, 78

M.

PAGE

Magan, *In re* 208, note
M'Knight *v.* Armagh County Council 137
M'Millan, Crean & Son, Limited, *v.* 105
Motor Union Insurance Co., Boggan *v.* 184, 222

P.

Parker's Divorce 154, note
Postmaster-General *v.* Antrim County Council 12

R.

Reade *v.* Royal Bank of Ireland 22
R. (Limerick Corporation) *v.* Comerton and the Local Government Board 76, 78
Royal Bank of Ireland, Reade *v.* 22
Russell and Baird, Ltd., *v.* Hoban 159

S.

Smyth *v.* Armagh County Council 137
Syron *v.* Kilmartin 164

T.

Thompson, Atkins *v.* 102

V.

Valuation, Commissioners of, *v.* Anderson 202

W.

Wycherly *v.* Flynn 28, 32, 169
Woolworth, Kelly *v.* 5

TABLE OF CASES CITED.

A.

PAGE

A., *Re*, ... 179
A. and B., *Re*, . . . 179, 181
Abrath *v.* North-Eastern Railway Co., ... 46, 48
Allen *v.* Bennet, ... 161
Altas Metal Co. *v.* Miller, 106, 109, 110, 112, 117, 118, 121, 123, 125, 127, 129, 130, 131, 133, 134, 135
Attorney-General *v.* Dean and Canons of Westminster, . 190
Attorney-General *v.* Meyrick, . 2

B.

Baines *v.* Bromley, 117, 118, 119, 121, 123, 124
Ballymagauran Co-operative Society *v.* County Councils of Cavan and Leitrim, 144, 146, 147
Barker *v.* Edger, ... 17
Beamish *v.* Beamish, . . . 61
Bellamy *v.* Debenham, . . 161
Bradshaw *v.* M'Mullan, . 32, 37, 172
Britain S.S. Co. *v.* The King, . 46, 55
Brophy *v.* Technical Education Committee of Limerick, . 99
Brown, *In re*; Ward *v.* Morse, 112, 117, 119, 120, 123, 126, 129, 133
Bullivant *v.* Attorney-General for Australia, ... 177
Burrows *v.* Wright, . . . 73

C.

Cavalier *v.* Pope, ... 6, 7, 9
Cave *v.* Hastings, ... 161
Christie *v.* Platt, 109, 110, 111, 115, 120, 123, 124, 125, 126, 130, 131, 133, 134, 138
Clarence Factory *v.* Corporation of Belfast, ... 59, 68
Clark *v.* Chambers, . . . 144
Cobb *v.* Great Western Railway Co., ... 145
Coe *v.* Wise, ... 100
Coghlan *v.* Cumberland, . . 46, 56
Cohen *v.* Hale, ... 25
Calbron *v.* Travers, . 33, 171, 175
Coleman, *In re*, ... 200
Colonial S. T. Co. *v.* Massey, . 46
Coman *v.* Governors of Rotunda Hospital, ... 9, 10
Compania Maritima of Barcelona *v.* Wishart, . . . 56
Congested Districts Board *v.* Mayo County Council, 60, 61, 64, 66, 68, 69
Conservators of the Thames *v.* Hall, ... 17
Cooper *v.* General Accident Insurance Co., 186, 190, 191, 192, 194
Cooper *v.* Slade, ... 46
Cooper *v.* Cooper, . . . 157
Coulter *v.* Crangle, 106, 121, 122, 126, 127, 130, 133, 135
Cumming *v.* Bedborough, . 31

D.

Davies *v.* Fitton, . . 32, 171, 175
Deacon *v.* South-Eastern Railway Co., ... 2
Devlin *v.* Belfast Corporation, . 144
Dobell *v.* Hutchinson, . . 161
Dobson *v.* Horsley, . . . 6, 7, 9
Dodds *v.* Shepherd, . . . 17
Dominion Natural Gas Co., Ltd., *v.* Collins and Perkins, . 150
Dominion Trust Co. *v.* New York Life Assurance Co., 46, 52, 56

PAGE

Duffy *v.* O'Meara, 106, 109, 121, 122, 126, 129, 130, 132, 135
Dyas *v.* Stafford, . . . 161

E.

E. A. B., *Re*, . . . 179
Elliott, *In re*, . , . 65, 68
Emery *v.* Day, . . . 101
Empire Assurance Corporation, *Re*, ... 161
English *v.* County Council of Kerry, . . . 144, 146

F.

Fell *v.* County Council of Cork, 63
Field *v.* Receiver of Metropolitan Police, 186, 187, 195, 196
Fleet *v.* Johnston, ... 55
Flynn *v.* Harte, . . . 2, 4
Foley *v.* Hill, . . . 24
Forrest *v.* Carte, 126, 130, 133, 135
Fox *v.* The Central Silkstone Collieries, Ltd., . 106, 125, 133, 134, 136
Fry, *Re*, ... 179, 180

G.

"Gairlock, The," . . . 46, 56
Gardner *v.* Lucas, . . . 34
Garnett *v.* Bradley, . . 17, 20
Gaskell *v.* King, 31, 33, 37, 171, 174, 176
Gordon and Adams' Contract, *In re*, . . . 205, 206
Gorman *v.* The Hand-in-Hand Insurance Co., 40, 41, 43, 45, 55
Greenland *v.* Chaplain, . . 143
Griffiths *v.* Patterson, . 126, 132

H.

Harvey *v.* Copeland, . . 17
Hawkins *v.* Gathercole, . . 17
Haydock *v.* Goodier, . . 165
Henderson *v.* M'Tear, . 106, 126
Hewitt *v.* Blumer, . . 119
Hickson *v.* Darlow, . . 34
Hill *v.* New River Company, . 144
Howe *v.* Synge, . . . 31
Hurst *v.* Evans, . . 40, 45, 55
Hussey *v.* Horne-Payne, . . 161

I.

PAGE

Indermaur *v.* Dames, . . 6, 8
Ingram *v.* Morecraft, . . 2

J.

Jackson *v.* Commissioner of Stamps, . . . 205
James *v.* Jackson, . 126, 133, 134
Joel *v.* International Circus and Christmas Fair, . . . 7, 10
Jones *v.* Daniel, . . . 161
Jones *v.* Stott, . . . 126
Joy *v.* Phillips, Mills, & Co., 46, 50, 56

K.

Keane, *In re*, . . 59, 65, 72
Kelly *v.* London and Staffordshire Fire Insurance Co., . 102
Kendall *v.* King, . . . 100
Kenmare *v.* Kerry County Council, . . . 59, 65
Kennedy *v.* Healy, . . 106, 126
Kerr *v.* Ayr S.S. Co., . . 50, 56
Kirby *v.* Kerry County Council, 15, 16, 60, 61, 63, 64, 65, 66, 67, 68, 69, 71, 75
Krelinger *v.* New Patagonia Meat, &c., Co., Ltd., . . 194

L.

Lamb *v.* Brewster, . . 33
Langdale *v.* Mason, . . 186
Lawrence *v.* Accident Insurance Co., ... 46, 55
Leyburn *v.* Armagh County Council, . . . 146, 151
Levingston *v.* The Guardians of Lurgan Union, . . . 99
Local Government Board *v.* Arlidge, . . . 81, 85, 89
Local Government Board *v.* M'Donnell, ... 99
London and Manchester Plate Glass Insurance Co. *v.* Heath, 46, 186, 216, 219
London Joint-Stock Bank *v.* Macmillan, ... 145
Lucy *v.* Bawden, . . . 6, 7, 9

M.

M., *Re*, ... 179, 181
Madden's Estate, . . . 13, 14
Magan's Case, . 205, 206, 207

PAGE

Mahony's Case, ... 81
Mahony *v.* Kerry County Council, ... 143
Manning *v.* Manning, . . 155
Mason *v.* Brentini, 108, 109, 116, 117, 118, 119, 121, 124, 129, 133
M'Cutcheon's Case, . . 68
Maclenan *v.* Segar, . . 8
Manchester Bonded Warehouse Co. *v.* Carr, ... 7
M'Dowell *v.* Corporation of Dublin, 59, 63, 65, 66, 68, 69, 71
Molesworth, *Re*, . . 179, 181
Montgomerie *v.* Wallace-James, 46, 52 56, 189
Morris *v.* Robinson, . . 23
Moyle *v.* Meath County Council, 59, 65
Munro, Brice, & Co. *v.* Marten, 42, 55, 56
Munro, Brice, & Co. *v.* War Risks Association, . . . 41, 46
Murphy *v.* Soady, . . . 100

N.

National Gas Engine Co. *v.* Dolphin's Barn Brick and Tile Co., 106, 122, 126, 127, 133
Naughton's Case, ... 72
Noblett *v.* Leitrim County Council, 59, 60, 66, 68, 69, 144, 146, 148
Norman *v.* Great Western Railway Co., ... 8, 11

O.

O'Connell *v.* Corporation of Cork, 73
O'Grady *v.* Wilmot, . . 205
Oliver *v.* Hunting, . . . 161
Owners of "Mendip Range" (S.S.) *v.* Radcliffe, . . 47, 57
Owners of "P. Caland" *v.* Glamorgan S.S. Co., . 47, 57
Owners of "Swansea Vale" *v.* Rice, ... 56

P.

Parker's Divorce Bill, . 154, 157
Parker *v.* Hudspith, . 165, 167
Peck's Settlement, *Re*, . . 33
Pelan, *Re*, ... 179

PAGE

Pettey *v.* Parsons, . . . 2, 3
Pocock and Prankerd's Contract, 210
Polemis *v.* Furness, Withy, & Co., 143, 145, 146, 148
Postmaster-General *v.* Great Southern and Western Railway Co., ... 13, 14
Postmaster-General *v.* National Telephone Co., . . . 13, 14
P. W., *Re*, ... 179

Q.

Quilter *v.* Mapleson, . . 34

R.

Rawlings *v.* Hodgson, . 165, 167
Readshaw *v.* Balders, . . 33
Reardon *v.* O'Donnell, . . 33
R. *v.* Bolton, ... 89
— (Bennett) *v.* King's County Council, ... 83
— *v.* Langford, . . . 186
— *v.* Latimer, . . . 144
— (Wexford County Council) *v.* Local Government Board, 89, 93, 95
— *v.* Murphy, . . . 81
— *v.* St. Olave's District Board, 81, 89
— *v.* Solely, ... 191
— (Sheehan) *v.* Tipperary Justices, ... 191
Reis *v.* Corporation of Dublin, 65, 71
Robbins *v.* Jones, . . . 9
Rogers, *Ex parte*, . . . 183
Rowland *v.* Cunningham, . 102
Ruoff *v.* Long & Co., . . 144
Russel *v.* Russell, . . . 119
Ryan *v.* Hartley, . . . 165

S.

Samuel *v.* Burnham, 122, 133, 135
Sanderson *v.* Cunningham, . 102
Saner *v.* Bilton, 107, 108, 109, 112, 113, 116, 117, 118, 119, 120, 121, 126, 129, 132, 133, 134
Santa Teodoro *v.* Santa Teodoro, 155
Scott *v.* Shepherd, . . . 144
Seward *v.* "Vera Cruz," . . 17
Shrapnel *v.* Laing, 113, 114, 118, 119, 121, 123, 124, 125

PAGE

Simms *v.* Registrar of Probates, . 17, 176
Skillen's Case, . . 727
Smith *v.* London and South-Western Railway Co., . 143
Spring Garden Insurance Co. *v.* Imperial Tobacco Co., . 188
S.S. "Serbino" *v.* Proctor, . 46, 51
Steele *v.* Belfast Corporation, 150
Stradling *v.* Morgan . . 17
Sutters *v.* Briggs, . . . 24

T.

Taggart *v.* Corporation of Belfast, ... 59, 73
Taylor *v.* Caldwell, . . 6
Thirkell *v.* Cambi, . . 161, 163
Thomas *v.* The Duchess Dowager of Hamilton, . . . 102
Thompson *v.* Adams, . . 102
Thynne *v.* Stewart, . . 205
Tobin, *In re*, ... 147
Tyler *v.* Cork County Council, 60, 61, 64, 66, 67, 68, 69, 71, 73, 74, 75, 146

U.

Udny *v.* Udny, . . . 155

PAGE

V.

Vardy, *Ex parte*, . . . 199
"Vera Cruz," The, . . 61
Vernon *v.* Wright, . . . 190

W.

Walker *v.* London Insurance Co., 46
Walker *v.* London and Provincial Insurance Co., . . . 144
Walsh, *Re*, ... 179
Ward *v.* Harris, . . . 102
Weld-Blundell *v.* Stephens, 143, 145
Wernher *v.* Beit, . . . 205
Westropp's Divorce Bill, . 156
Wheeler *v.* Commissioners of Public Works, . . . 100
Wilde *v.* Armagh County Council . . . 65, 71, 72
Williams *v.* Minister of Munitions, ... 165, 167
Winicofsky *v.* Army and Navy General Assurance Co., . 41
Winspeare *v.* Accident Insurance Co., ... 46, 55
Wormwell *v.* Hailstone, . . 101
Worthington *v.* Tipperary County Council, . 66, 68, 69, 144, 148

CASES

DETERMINED BY

THE KING'S BENCH DIVISIONS

OF

THE HIGH COURTS OF JUSTICE IN SOUTHERN AND IN NORTHERN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURTS OF APPEAL IN SOUTHERN AND IN NORTHERN IRELAND,

AND IN

THE HIGH COURT OF APPEAL FOR IRELAND.

1922.

GEOGHEGAN *v.* HENRY (1).

Appeal. (*S. I.*) 1921.

Nov. 16.

Right of way—Erection of gate—Obligation of dominant owner to shut the gate.

A landowner over whose holding an adjoining owner had a general right of way erected a gate across the passage over which the right existed. There was no intention on the part of the servient owner to derogate from the rights of the dominant owner, but the latter, objecting to the obstruction, left the gate open after he had used the way. The servient owner, suing by civil bill, claimed damages for the failure and refusal by the dominant owner to close the gate. No actual damage was caused.

Held, the gate having been erected by the servient owner in the reasonable and proper exercise of his rights in his own property, that an obligation was cast upon the dominant owner to shut it.

CASE STATED by Mr. Commissioner Sullivan at Roscommon Summer Assizes, 1921, on the hearing of a civil bill appeal.

The civil bill was for £10 damages for failure and refusal by the defendant to close a gate erected by the plaintiff across a right of way admittedly enjoyed by the defendant over the lands of the plaintiff, and for damages done to the said gate. It was admitted that the defendant had a general right of way over plaintiff's lands from defendant's farm to the public road. Near the public road the plaintiff erected a dwelling-house, and for reasonable comfort and convenience

(1) Before O'CONNOR M.R., and RONAN and O'CONNOR L.JJ.

Appeal. (*S. I.*) 1921.

GEOGHEGAN v. HENRY.

in the use of that house he enclosed a space around it of about half an acre. In the wire fence enclosing this space the plaintiff erected a gate across the passage over which the right of way existed.

The plaintiff had no intention of derogating from defendant's rights over the passage, but the defendant objected to the obstruction. In order to assert his claim to have the passage unobstructed, the defendant when passing opened the gate, and left it open behind him. No actual damage accrued to the plaintiff, who was, however, exposed to the inconvenience and annoyance of having to close the gate when he discovered it open. The County Court Judge gave a decree for 1*s.* and costs.

The learned Commissioner found the following facts:—(*a*) The enclosing of the curtilage around the house was a reasonable and proper exercise of plaintiff's rights in his own property; (*b*) the opening and closing of the gate was an inconvenience to the defendant, but was not a material obstruction of his right of way; (*c*) no actual damage was caused by the defendant's default.

The questions for the decision of the Court were:—1. Is the plaintiff entitled to erect the gate across the passage? 2. Is defendant legally compellable to close the gate? 3. Is the action maintainable without actual damage?

K. Kennedy and *Leonard K.C.*, for the appellant:—

As no damage was sustained by the plaintiff, he has no right of action. In *Pettey* v. *Parsons* (1) there was an express grant of a right of way, and on the construction of the grant it was held that the right of way was not substantially interfered with, and that the plaintiff was entitled to erect a gate, which, however, should be kept open during business hours, and should never be locked. The only Irish case on this subject is that of *Flynn* v. *Harte* (2), decided by Dodd J. on circuit. He held that a gate was no obstruction of a right of way.

W. G. Shannon (with him *Fetherstonhaugh K.C.*), for the respondent:—

The fact that there was no damage does not relieve the defendant from his obligation to shut the gate. There was a liability to damage, and that is sufficient to maintain the action. The defendant was bound to maintain the property of the plaintiff in the position in which he found it. [Authorities cited: *Deacon* v. *South-Eastern Railway Co.* (3); *Ingram* v. *Morecraft* (4); *Attorney-General* v. *Meyrick* (5).]

O'CONNOR M.R.:—

In this case the plaintiff and the defendant are landholders, and their holdings adjoin one another. The holding of the plaintiff is situated between the holding of the defendant and the public road, and the defendant has enjoyed and is entitled to a right of way across the holding of the plaintiff to the public road. The plaintiff, anxious to improve his place, enclosed a plot surrounding his house. That

(1) [1914] 2 Ch. 653.
(2) [1913] 2 I. R. 322.
(3) 61 L. T. 377.
(4) 33 Beav. 49.
(5) 79 J. P. 515.

plot includes the land over which the defendant has the right of way, and the plaintiff, in recognition of the right, left an opening, across which he erected a gate. The defendant exercised his right of way through that gate, but he contends that it is not his duty, having opened the gate, to shut it. The plaintiff brought a civil bill action against him for not closing the gate on passing through, and the County Court Judge awarded one shilling damages. The defendant appealed from that decision, and the question comes before us on a case stated by Serjeant Sullivan, Commissioner of Assize. In the case the Commissioner states that the enclosing of the curtilage around his house by the plaintiff was a reasonable and proper exercise of his right in his own property; and he further finds that the erection of the gate across the right of way was not a material obstruction of the defendant's right.

The only question, therefore, for decision is whether the defendant is bound after he uses the gate to shut it. For what purpose was the gate put there? In the first place, it was erected to prevent any live stock within the enclosed curtilage from roaming into the adjoining land; and, secondly, it was erected to prevent live stock on the adjoining land from going into the enclosed curtilage. If the plaintiff was entitled to put up a gate, he was certainly entitled to keep it closed, or else it would not fulfil its purposes at all. The gate was put across the right of way that it might be always shut, except when actually used. It appears to me that once it is admitted that the erection of the gate was not an obstruction, it follows that the person entitled to the right of way is bound and has imposed on him a duty to shut the gate. It is found by the case that the opening and closing of the gate was an inconvenience to the defendant, but was not a material obstruction of his right of way.

The question really depends on what was a reasonable user. Each party is bound to act reasonably. It is clearly laid down in *Pettey* v. *Parsons* (1) that the question is whether there is a substantial interference with the right of way. Lord Cozens-Hardy M.R. says: "There must be a real substantial interference with the enjoyment of the right of way. It is contended by the defendant that any gate which interferes with the full and absolute enjoyment of every inch of way is per se and necessarily an obstruction in respect of which he was justified in pulling down, as he did, this gate." Swinfen-Eady L.J. said the test was "whether the easement has been substantially interfered with." Lord Justice Pickford's judgment was to the same effect. Therefore, as I have already said, the question is: Is there a substantial interference with, or is there an unreasonable use of, the right of way?

I am of opinion that an obligation is cast upon the defendant in this case to close the gate, because if he failed to do so the gate would cease to serve its legitimate purpose. The gate might be opened, and remain open all day, if there was nobody in the plaintiff's house to close it, and the plaintiff's stock might wander out, or other stock enter into the enclosure. The plaintiff might have intended to lay out the place as an ornamental plot, and, if so, the invasion of the place by stock would cause damage.

(1) [1914] 2 Ch. 653.

Appeal.
(S. I.)
1921.

GEOGHEGAN
v.
HENRY.

RONAN L.J.:—

I am of the same opinion. The plaintiff had a right to put up the gate, and the defendant had a right to open the gate for the purpose of passage. The plaintiff was entitled to have it shut at other times; but if the defendant left it open each time after he had passed through, the result would be that the plaintiff should keep on duty a person to shut the gate whenever the defendant opened it. It would be grotesque to hold that the law imposed such an obligation upon the owner of a servient tenement. In my opinion, the passage quoted by the Master of the Rolls clearly states the law. The right of the defendant is to pass through and open the gate for that purpose; but he is under an obligation not to affect the servient tenement further or otherwise than is necessary in the exercise of his right. I entirely adopt the judgment of Dodd J. in *Flynn* v. *Harte* (1).

O'CONNOR L.J.:—

I agree. A person can use his own property in any way he pleases, provided he does not injure others. Therefore, the owner of a tenement which is subject to a right of way can use his tenement in any fashion that suits him, provided he does not interfere with the reasonable enjoyment of the right of way; and no person of common sense could say that the putting up of an unlocked gate for the improvement of the premises, in the manner disclosed in this case, interfered with the reasonable exercise of the user of the way. We start, accordingly, with this—that the gate was lawfully there, and was none the less so because closed. The defendant, who seems to be a very bold litigant, interfered with the gate so lawfully there; he was entitled to do this, because otherwise he could not get through; but having, for his own purposes exercised his lawful right of interference with the gate, it became his duty to replace the gate, and put it in the same position as it was in before. In other words, it was his duty to shut it. It is plain justice and plain law, and it is to my mind astonishing that any doubts should ever have arisen on the point. I may say I agree with every word of the admirable judgment of Dodd J. in *Flynn* v. *Harte* (1).

Solicitor for the appellant: *Joseph H. Dixon.*
Solicitors for the defendant: *Fair & Murtagh.*

C. L.

(1) [1913] 2 I. R. 322.

KELLY *v.* WOOLWORTH & CO. (1).

Appeal,
(S. I.)
1921.
Nov. 16.
Dec. 2.

Negligence—Restaurant rooms hired for entertainment—Servant of proprietor present to supervise catering—Lease or licence—Dangerous floor—Guest injured—Liability.

C. hired rooms from the defendants, proprietors of a restaurant, for a whist drive and dance. Only persons invited by C., or who had purchased tickets from her, were admitted to the entertainment. An employee of the defendants was present on their behalf to supervise catering for C.'s guests supplied by the defendants, but C. was de facto in control of the premises during the entertainment. The plaintiff, one of the ticket-holders, while dancing had her heel caught in some linoleum covering the floor. She fell and sustained injuries in respect of which she claimed damages from the defendants. The Recorder of Dublin awarded the plaintiff £50 damages. His decree was reversed by Moore J. on appeal. In stating a case the learned Judge found that the floor was in a dangerous condition.

Held, that the plaintiff had a good cause of action against the defendants:

Per Ronan L.J., on the grounds that the defendants had never parted with their estate, possession, or occupation of the rooms; that they had authorized C. to invite the plaintiff, and that the latter was on the premises in virtue of their invitation.

Per O'Connor L.J., on the ground that the entertainment was a joint venture of C. and the defendants, and that both parties were jointly responsible if they failed in reasonable care for the safety of their guests.

CASE STATED by Mr. Justice Moore on the hearing of an appeal from the Recorder of Dublin as follows:—

1. This was an appeal from a decision of the learned Recorder of Dublin, whereby he awarded the plaintiff the sum of £50 with costs and witnesses' expenses in respect of injuries received by the plaintiff owing to the negligence of the defendants. By agreement of counsel on each side, the following statement of facts is taken verbatim from a considered judgment which I delivered in Dublin.

2. The facts are simple. The defendants are proprietors of premises in Henry Street, which during the day are used as a restaurant. The plaintiff, who is a shop assistant, took a ticket from a Mrs. Cotter, Drumcondra, for a whist drive and dance to be held on the evening of October 30th, 1920, in the defendants' rooms. Mrs. Cotter was the promoter and organizer of the entertainment, and the plaintiff paid her 3*s.* 6*d.* for her ticket of admission, which went to a charitable object. Miss Kelly knew nothing of the defendants. Her contract was solely with Mrs. Cotter. It appeared from the evidence of a Miss Martin, in the defendants' employment, that Mrs. Cotter had hired the rooms in question from the defendants as from 8 o'clock p.m. to 12 p.m. on the night mentioned for the sum of four guineas. She had done so on previous occasions for similar purposes. I find that she was, by virtue of this contract, in control for those hours, having power alone to invite or to admit people who had purchased tickets from her or through her, and to exclude whom she pleased. Messrs. Woolworth had Miss Martin present, but I find that she was there for

(1) Before RONAN and O'CONNOR L.JJ.

Appeal. (*S. I.*) 1921.

KELLY *v.* WOOLWORTH.

them merely to supervise the catering for Mrs. Cotter's guests supplied by Woolworth, and if necessary to report any outbreak of possible, though unlikely, disorder on their part which might imperil Messrs. Woolworth's property; but that Mrs. Cotter, and not Miss Martin, was de facto in control of the premises during the entertainment. The plaintiff attended as a guest of Mrs. Cotter's, and while dancing her heel caught in some linoleum covering the floor. She fell and sustained severe injuries, and if she is entitled to damages she is certainly entitled to the £50 already awarded. I find the floor was in a dangerous condition. I am, however, of opinion that she is not so entitled. The action is brought in negligence. What was the plaintiff's position towards defendants? She was not their invitee or guest; she was not their licensee, though she certainly was not a trespasser. But what duty did they owe to her? They had parted with the control of the premises, dangerous as they might be, for a few hours, it is true, to Mrs. Cotter. Mrs. Cotter had invited the plaintiff. Mrs. Cotter may probably on the facts be taken as having in effect represented to the plaintiff that the room would be safe for dancing in. It may have been Mrs. Cotter's duty to the plaintiff as her guest to see that it was so. But what duty towards the plaintiff were the defendants under? They had put Mrs. Cotter in the control which she had purchased from them. I think the condition of the room was dangerous when Mrs. Cotter took it from the defendants, though the defendants were not aware of it. I do not say what Mrs. Cotter's right may be against the defendants if the plaintiff can and will recover against Mrs. Cotter. In my opinion the case is ruled by *Cavalier* v. *Pope* (1), subsequently acted on in *Lucy* v. *Bawden* (2) and *Dobson* v *Horsley* (3). I think the defendants may have let the premises in a dangerous state to Mrs. Cotter, but she was the owner in occupation pro tanto, and as such liable to the plaintiff if any liability exists for dangers arising from the condition of the room.

3. Mr. O'Connor, for the plaintiff, argued that where owners of property hold that property out to the general public as being reasonably fit for the purpose for which it was intended and was being hired, then there arose a duty towards all members of the public using the room or property for such a purpose, for breach of which they were liable in damages, and he also argued that such duty arose entirely independent of privity of contract between plaintiff and the defendants. I thought that such a duty only arose through contract, and that the decree should be reversed; but I have agreed to state a case at the request of Mr. O'Connor, so make no order at present.

Lardner K.C. and *J. O'Connor*, for the appellant:—

The case most resembling this is *Taylor* v. *Caldwell* (4). The plaintiff having been lawfully on the premises, and there being a finding that the floor was dangerous, she has, on the authority of *Indermaur* v. *Dames* (5), a good cause of action against the defendants.

(1) [1906] A. C. 428.
(2) [1914] 2 K. B. 318.
(3) [1915] 1 K. B. 634.
(4) 3 B. & S. 826.
(5) L. R. 1 C. P. 274.

Serjeant Hanna and *Sainsbury*, for the defendants :—

The test in cases like this is who was in control, and Moore J. finds that Mrs. Cotter was pro tempore in control. There was no contract between the plaintiff and the defendants, and apart from contract she cannot recover damages against the defendants unless they were in control. [Authorities cited :—*Cavalier* v. *Pope* (1); *Lucy* v. *Bawden* (2); *Dobson* v. *Horsley* (3); *Manchester Bonded Warehouse Co.* v. *Carr* (4); *Joel* v. *International Circus and Christmas Fair* (5).]

RONAN L.J. :—

It appears from the case stated that the defendants are a limited company, carrying on the business of restaurant proprietors in Henry Street, Dublin. The rooms in the present case are part of the restaurant. I think it plain that Moore J. decided the case on the ground that the defendants owed no duty to the plaintiff.

Dances for charitable objects are constantly held in hotels and restaurants, as the proprietors can provide refreshments or suppers with their own plant and staff much more cheaply and efficiently than could be done in the case of a mere vacant concert hall being taken, and also because they will give the use of the rooms at a lower figure on account of the profit they expect to make on the payments for refreshments. Mrs. Cotter hired the rooms from the defendants for a whist drive and dance as from 8 p.m. to 12 p.m. for £4. She had done so on previous occasions. The plaintiff got from her for similar purpose a ticket of admission for 3*s.* 6*d.*, "which went to a charitable object." The case proceeds, paragraph 2: "I find that she was by virtue of this contract in control for those hours, having power alone to invite or admit people who had purchased tickets from her or through her, and to exclude whom she pleased." This puts it beyond doubt that Mrs. Cotter was authorized by defendants to invite ticket-holders to the rooms for the four hours. The case goes on: "Messrs. Woolworth had Miss Martin present, but I find that she was there for them merely to supervise catering for Mrs. Cotter's guests supplied by Woolworth." This plainly involves that it was part of the arrangement that the defendant company should, by their servants, supply the refreshments for the dance. There is no suggestion that they were to do so gratuitously. There is no suggestion that Mrs. Cotter had anything to say to the refreshments. The plain meaning is that at the entertainment Messrs. Woolworth were to sell refreshments to the persons they had authorized Mrs. Cotter to invite, and that Miss Martin was to supervise this on their behalf.

The case goes on: "And if necessary to report any outbreak of possible, though unlikely, disorder on their part which might imperil Messrs. Woolworth's property" (obviously that Woolworth's man might come in and stop it); "but that Mrs. Cotter, and not Miss Martin, was de facto in control of the premises during the entertainment." But Miss

(1) [1906] A. C. 428.
(2) [1914] 2 K. B. 318.
(3) [1915] 1 K. B. 634.
(4) 5 C. P. D. 507.
(5) [1920] W. N. 365, 383.

Appeal. (*S. I.*) 1921.

KELLY *v.* WOOLWORTH.

Ronan L.J.

Martin was "to supervise the catering." Dancing is hungry and thirsty work. A dance without refreshments would be what Lord Bowen called "a melancholy spree." The restaurant keepers were to supply the necessary restoratives in what had been, at all events up to 8 p.m., their own restaurant. Thackeray tells us that when the O'Mulligan, of Ballymulligan, was considering whether he would honour Mrs. Perkins' ball by his presence, he asked, "Is it a supper ball or only a tay ball?" There can be no doubt that refreshments are an important element among inducements to go to a dance. An announcement of "no refreshments" would be fatal.

This is an action of negligence. Negligence is breach of duty. The duty may arise from contract, or may be wholly independent of contract. This latter case is pure tort. Sir F. Pollock says at pp. 2, 3, in what M'Cardie J., in *Maclenan* v. *Segar* (1), calls his masterly treatise on the Law of Torts:—"In cases of tort the duty that has been violated is general. It is owed either to all our fellow-subjects, or to some considerable class of them, and it is fixed by the law and the law alone. Here lies the difference between civil wrongs properly so called and breaches of contract . . . But breach of contract . . . is the breach of duties which the parties have fixed for themselves . . . The duties broken by the commission of civil wrongs are fixed by law and independent of the will of the parties; and this is so even where they arise out of circumstances in which the responsible party's own act has placed him." There is no doubt that the law casts a duty on the person in possession and occupation of premises to persons coming on the premises, either by his invitation, express or implied, or with his permission, and that these duties are fixed by law alone, and arise from the possession and occupation. I shall refer to them as "legal duties."

As between the occupier and any particular person other duties, either greater or less, may be substituted for these duties by contract; these I shall call contractual duties. The "legal duty" is cast on the owner and occupier. If it is sought to cast the duty on anyone else, a "contractual duty" must be established by the plaintiff. To whom is the "legal duty" due? At p. 329 of *Maclenan* v. *Segar* (1) M'Cardie J. says: "Now, no contract at all existed between the plaintiff and the defendant in the cases of *Indermaur* v. *Dames* (2) and *Norman* v. *Great Western Railway Co.*" (3). They are therefore cases on the "legal duty" only. In the latter case, at p. 591, Buckley L.J. refers to the classes to whom the legal duty is due. He says: "The liability is lowest towards a trespasser. . . . He had no right to be there, and if he is injured he must bear the consequences. The next is the case of a licensee. He is allowed to come on the premises, and he must take them as they are, but the occupier must not expose him to a hidden peril. If the occupier knows of a danger upon the premises, he must warn the licensee; he owes a duty to the licensee not to lay a trap for him. Next in the ascending scale is the invitee."

Moore J. in the case stated says: "The action is brought in negligence. What was the plaintiff's position towards the defendants? She was not their invitee or guest; she was not their licensee, though she certainly was not a trespasser."

(1) [1917] 2 K. B. 325. (2) L. R. 1 C. P. 274. (3) [1915] 1 K. B. 584.

Now, it is clear from the judgment of Buckley L.J. that if she was not a trespasser the occupier owed her some duty. But Moore J. did not rest his judgment on her position. He did not inquire into the difference between the duty to a non-trespasser who is a licensee and one who is an invitee. It was on the position of the defendants he decided the case. He says: "But what duty towards the plaintiff were the defendants under? They had put Mrs. Cotter in the control which she had purchased from them. I think the condition of the room was dangerous when Mrs. Cotter took it from the defendants, though the defendants were not aware of it." He then gives his decision and the grounds for it in these words: "In my opinion the case is ruled by *Cavalier* v. *Pope* (1), subsequently acted on in *Lucy* v. *Bawden* (2) and *Dobson* v. *Horsley* (3). I think the defendants may have let the premises in a dangerous state to Mrs. Cotter, but she was the owner in occupation pro tanto, and as such liable to the plaintiff if any liability exists for dangers arising from the condition of the room."

In my opinion the case was stated on this question, and this question only, viz., were the defendants under any duty to the plaintiff, and not on any question as to the extent of the duty, or as to any difference between the duty to licensees and invitees. It is obvious that Moore J. was not considering this question, or he would not have made the statement that plaintiff was neither trespasser, licensee, nor invitee. It was only a passing statement, as he well knew that if there was any duty on the part of the defendants, it would extend to some extent to all but trespassers. The cases referred to show this clearly. In the last of them, *Dobson* v. *Horsley* (3), Buckley L.J., referring to *Cavalier* v. *Pope* (1), quotes the judgment of Lord Macnaughten, as follows: "The law laid down in the judgment of Erle C.J. in *Robbins* v. *Jones* (4) is beyond question: 'A landlord who *lets a house in a dangerous state* is not liable to the tenants, customers, or guests for accidents happening during the term.'" These words in italics are the words in the case stated. In each of the three cases there was a lease. The tenant in possession was the occupier. The landlord—the reversioner—was sued; and it was held that it was necessary to establish a contractual liability on his part. Here Moore J. held that Mrs. Cotter "was the owner in occupation pro tanto" (this must mean from 8 p.m. until 12), and as such liable to the plaintiff. This, of course, involves the proposition that the defendants were not then the owners in occupation, and there being no contract between them and the plaintiff, the case was ruled by *Cavalier* v. *Pope* (1). It is obvious that *Cavalier* v. *Pope* (1) has no application whatever to a case where the defendant is the owner and occupier.

There is no doubt that prior to 8 p.m. the defendants were the owners in possession and occupation of the premises. Did they ever cease to be such? This depends on the simple question of law, whether this contract with Mrs. Cotter was a lease or a licence. The case of *Coman* v. *Governors of Rotunda Hospital* (5) is clear: that if it was not

(1) [1906] A. C. 428.
(2) [1914] 2 K. B. 318.
(3) [1915] 2 K. B. 634.
(4) 15 C. B. N. S. 221.
(5) [1921] A. C. 1.

Appeal. (*S. I.*) 1921.

KELLY v. WOOLWORTH.

RONAN L.J.

a lease but a licence, "the possession and occupation of the rooms remain in the owner." All the Lords are clear as to this. The question depends on whether the relation of landlord and tenant is created.

There are numerous cases on the subject. I only think it necessary to refer to the recent case in the House of Lords, which was a decision on so-called lettings, some of which were for six months. It is absurd to think that by a hiring for four hours for a dance the parties intended that an estate should pass. [The Lord Justice referred in some detail to the facts and judgments in *Coman* v. *The Rotunda Hospital* (1), and said]:—It appears to me to go far beyond the present, and to establish that the defendants never parted with their estate or with the possession and occupation of the rooms. It is obvious that the persons taking the Rotunda rooms had the exclusive right of admitting to the entertainments.

Serjeant Hanna referred me to the case *Joel* v. *International Circus* (2). The agreement in that case prohibited sub-letting, "and there were various references to the plaintiff as 'tenant' and to the holding as 'tenancy.'" The case is quite unlike the present. Lord Sterndale M.R. said, at p. 383, that "he hoped that their decision would not be cited as an authority in any other case." The facts in the case were stated on the assumption that the transaction was a lease, and that Mrs. Cotter was giving the entertainment in rooms of which she was the "owner and occupier" for the time being. But once it is established that the defendants were the owners and occupiers and never ceased to be such, these facts assume another aspect. The restaurant is open to all comers during the day. A man goes in, consults the bill of fare, does not like the terms or the prices, and goes out. He is beyond doubt an invitee.

The defendants determine to open the restaurant from 8 p.m. to 12 for the purpose of a whist drive and dance, and to supply provisions at the entertainment, but the restaurant is not to be open to all comers; it is only to be open to a limited class. What is that class? In the words of the case, "people who had purchased tickets from her or through her, she having power alone to invite or admit, and to exclude whom she pleased." If the transaction had been a lease, Mrs. Cotter would have had this power as owner in possession pro tem. without any grant of it by defendants; but as it was not, defendants had alone this power. They expressly authorized Mrs. Cotter to invite whom she pleased and issue tickets which would admit. Qui facit per alium facit per se. Surely it cannot be contended that Mrs. Cotter was the defendant's agent duly authorized to invite and give tickets of admission to their premises, and none the less so because she paid £4 for this authority, which she paid out of the moneys she got from the ticket-holders.

The case says the plaintiff was neither a trespasser, a licensee, nor an invitee. Does this mean on defendants' premises or on Mrs. Cotter's premises—a trespasser as regards the defendants or as regards Mrs. Cotter? It plainly must be as regards the defendants. No such question could arise as to Mrs. Cotter. Then why was she not a trespasser as regards defendants?

(1) [1921] A. C. 1.

(2) [1920] W. N., at pp. 365 and 383.

The only possible ground is because they had authorized Mrs. Cotter to invite her, and therefore she was there in virtue of their invitation, and they hoped to make a profit out of everyone that came. What is the duty to an invitee? I take the law from *Norman* v. *Great Western Railway Co.* (1), already referred to; Buckley J. at 592; Phillimore, 596; Pickford, 598.

The injury, etc., is thus described:—"While dancing her foot caught in some linoleum covering the floor; I find the floor was in a dangerous condition"; and further on, "I find the condition of the room was dangerous when Mrs. Cotter took it from defendants." There is no suggestion that the plaintiff had any ground for expecting the danger, or that she was in any respect guilty of any negligence in the matter.

The Judge says:—"I think the defendants were not aware of it," i.e., "the dangerous condition of the room when Mrs. Cotter took it." This might be of importance if any question of negligence was raised; but no such question was raised on the case or argued before us. The distinction between "I think" and "I find" is clear, but it is obvious that the Judge decided solely on the ground that there was no duty on the part of the defendants to plaintiff.

It may be suggested that what passed between the plaintiff and Mrs. Cotter had the effect of releasing the defendants from their "legal duty" as owners and occupiers. This, no doubt, could be done by contract between the plaintiff and the defendants. There are two answers to this—1. That the decision in favour of the defendants is entirely based on the absence of any contract between them and the plaintiff. 2. That if there was such a contract, it was the contract effected by the sale of the tickets; and if the defendants allege that this contract was made by Mrs. Cotter as their agent on their behalf, they must accept the responsibility attaching to the owners and occupiers of premises who make such a contract, which is greater than that due to an invitee.

O'CONNOR L.J.:—

I base my decision on reasons somewhat different from those expressed by my colleague. That is not to say that I differ from these reasons, but they involve the consideration of questions of far-reaching importance upon which I desire to reserve my opinion.

The entertainment provided for the guests on the occasion in question was, as the Lord Justice pointed out, of a twofold character, comprising dancing and refreshments. This entertainment, on the clear facts of the case, was, in my opinion, a joint venture of Mrs. Cotter and the defendants, the former taking the dancing fees, and the latter the profits of the refreshments. Both parties were therefore jointly responsible if they failed in reasonable care for the safety of their guests; and as the learned Judge, in effect, though not expressly, has found that the accident was due to failure to take such reasonable care, I am of opinion that there is no defence to the action.

Solicitor for the appellant: *John J. MacDonald.*
Solicitor for the respondents: *M. Good.*

C. L.

(1) [1915] 1 K. B. 584.

Appeal.
(S. I.)
1921.
Nov. 8.

HIS MAJESTY'S POSTMASTER-GENERAL, Applicant; THE COUNTY COUNCIL of the COUNTY OF ANTRIM and the RURAL DISTRICT COUNCIL OF BALLYCASTLE, Respondents (1).

Criminal injuries—Postmaster-General as successful applicant for compensation—Right to costs—Telegraph Act, 1878 (41 & 42 *Vict. c.* 76), *sect.* 11; *Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5, *sub-s.* 6.

Where the Postmaster-General in his corporate capacity successfully applies for compensation under the Malicious Injuries Code for injury to corporate property, the County Court Judge and the Judge of Assize may award him costs.

Case Stated by Moore J. sitting as Judge of Assize at the Assizes held at Belfast for the County of Antrim on July 18th, 1921, on the hearing of an application by the Postmaster-General for £15 compensation for malicious injury done to certain telegraph and telephone wires, the property of the applicant, at Broommore, in the County of Antrim, on January 14th, 1921.

The case stated was as follows:—

This application was heard before His Honor the County Court Judge for said County of Antrim, at Ballymoney, and said County Court Judge, on the 29th day of April, made a decree on said application that the applicant do recover from the said County Council of Antrim the sum of £9; but no costs or expenses were awarded to the applicant by the said decree.

The applicant appealed against so much of said decree as did not award costs or expenses to the applicant. This appeal was heard before me sitting as Judge of Assize for said County of Antrim, and on said hearing the following facts were proved in evidence or admitted before me:—

The said telegraph and telephone wires were under the management and control of the applicant as His Majesty's Postmaster-General, and were maliciously injured to the amount awarded in said decree.

After argument, I held that the applicant, as His Majesty's Postmaster-General, represented the Crown, and was not liable to pay or entitled to receive costs. I affirmed the said decree of the said learned County Court Judge, but gave the applicant liberty to appeal to His Majesty's Court of Appeal by way of case stated. If I had not been of opinion that I was bound to refuse costs and expenses to the applicant, owing to his position as representing the Crown, I would have allowed costs and expenses as follows, and varied the decree of the County Court Judge accordingly:—In the County Court, £2 5*s.* costs and 7*s.* 6*d.* witnesses' expenses.

(1) Before O'Connor M.R., and Ronan and O'Connor L.JJ.

I stated this case by way of appeal, having given liberty to appeal upon the terms that the Postmaster-General agrees, for the purpose of the appeal only, to abide any order the Court of Appeal may make as to costs, as though he were appealing as a private individual, and not as representing His Majesty the King.

S. L. Brown K.C. (with him *E. S. Murphy K.C.* and *J. C. Davison*), for the appellant:—

The property in respect of which compensation was claimed was vested in the Postmaster-General in his corporate capacity. Sect. 11 of the Telegraph Act, 1878 (41 & 42 Vict. c. 76), enables him to sue as if he were a body corporate, and to recover a debt as if it were a debt due to a private person. As such he is entitled to receive and liable to pay costs. Where he applies for compensation for criminal injuries to property vested in him, the County Court and the Judge of Assize may, under section 5, sub-s. 6, of the Local Government (Ireland) Act, 1898, award costs to or against him. The claim of the Postmaster-General to costs in this case is supported by *Postmaster-General v. Great Southern and Western Railway Co.* (1); *Postmaster-General* v. *National Telephone Co.* (2). We rely especially upon the discussion in this case as given in a shorthand report of the proceedings taken for the Post Office.

Maguire, for the respondents:—

Section 11 of the Telegraph Act of 1878 is simply a procedure section. Unless there is express statutory enactment to the contrary, the Crown is not liable to pay or entitled to receive costs. Under the Malicious Injuries Code there is no power to award costs to the Crown. The Postmaster-General represents the Crown. The concluding part of the judgment of the Lord Chancellor in *Postmaster-General* v. *Great Southern and Western Railway Co.* (1) is against the claim made here by the Postmaster-General for costs.

O'CONNOR M.R.:—

In the case of the *Postmaster-General* v. *Great Southern and Western Railway* (1) I decided that the Postmaster-General was, when he was unsuccessful in an action, liable to pay costs. The broad ground of my decision was that the Postmaster-General is an independent corporation, separate and distinct from the Crown, having the rights and liabilities of an ordinary corporation. In the Court of Appeal my decision was affirmed, but not on the wide ground on which my judgment was based. The Lord Chancellor, who gave the judgment of the Court, preferred to rely on the 53rd section of the Judicature Act, which places costs in the discretion of the Court. This is at variance with the opinions expressed in this Court by FitzGibbon and Walker L.JJ. in *Madden's Estate* (3); but I think that the present case does not call for any decision as between these differences of opinion. We are now dealing with a claim made by

(1) [1916] 1 I. R. 74; 50 I. L. T. R. 137. (2) [1909] A. C. 269.
(3) [1902] 1 I. R. 63, at pp. 67 and 71.

Appeal. (*S. I.*) 1921.

POSTMASTER-GENERAL v. ANTRIM CO. COUNCIL.

the Postmaster-General against the County Council for a malicious injury to property legally vested in him in his corporate capacity. It is admitted that he is the proper person to make the claim, and that being so the case comes within sect. 5, sub-s. 6, of the Local Government Act, 1898, which enables the County Court Judge and Judge of Assize respectively to award costs to or against any party to any proceeding under the section.

Mr. Maguire, for the County Council, submitted that this section does not apply to the Crown; but the claim was made by the Postmaster-General as an owner of property in his corporate capacity.

RONAN L.J.:—

I see I took no part in the hearing of the case of the *Postmaster-General* v. *Great Southern and Western Railway Co.* (1) in this Court. The case was heard before the Master of the Rolls soon after I became a Judge. I think I must have had a brief in the case, but I have no recollection of it. The Master of the Rolls has referred to the case as being at variance with the case of *Madden's Estate* (2). O'Brien C. carefully points out that the cases are quite distinct. *Madden's Estate* (2) had nothing to say to sect. 11 of the Telegraph Act, 1878. The *Postmaster-General* v. *Great Southern and Western Railway Co.* (1) was a decision on the effect of that section, and the decision of the Court was specifically based on the decision of the House of Lords on the identical section in the *Postmaster-General* v. *National Telephone Co.* (3), and the special report referred to by O'Brien C. at pp. 89 and 90 of the report.

The Postmaster-General here sues under a statutory right conferred on certain persons by the Malicious Injury Code. There is no dispute as to his right to sue in the capacity in which he has sued. It follows that he is a proper party to the proceeding, and therefore within the provision as to costs in the statutes which confer on him the right to sue.

O'CONNOR L.J.—I concur.

Solicitor for the appellant: *G. R. Reid.*

Solicitors for the respondents, the Ballycastle Rural District Council: *P. & J. Boyle.*

C. L.

(1) [1916] 1 I. R. 74; 50 I. L. T. R. 137.
(2) [1902] 1 I. R. 63.
(3) [1909] A. C. 269.

LEYBURN, APPLICANT; ARMAGH COUNTY COUNCIL, RESPONDENT (1).

High Court of Appeal.
1921.
Dec. 21.
1922.
Jan. 16.

Criminal injury—Compensation—Right of appeal—Jurisdiction of the High Court of Appeal for Ireland—10 & 11 Geo. 5, c. 67, s. 43.

In applications for compensation for malicious injury, the High Court of Appeal for Ireland has jurisdiction to hear and determine appeals from the Courts of Appeal in Southern and Northern Ireland respectively, under 10 & 11 Geo. 5, c. 67, s. 43, notwithstanding that the County Court (Appeals) Ireland Act, 1889 (52 & 53 Vict. c. 48), s. 8, and Order 59, r. 73, of the Rules of the Supreme Court, 1905, provide that the decision of the Court of Appeal in Ireland shall be final and conclusive.

APPEAL on behalf of the Armagh County Council from an order of the Court of Appeal in Southern Ireland, dated the 9th day of November, 1921, made in the matter of an application for compensation for criminal injury to property, and of the Local Government (Ireland) Act, 1898, sect. 5, and the Acts amending and extending same.

The order of the Court of Appeal in Southern Ireland of the 9th November was as follows:—

"The appeal of the respondents above mentioned by special leave under sect. 5 of the Local Government (Ireland) Act, 1898, from the decision pronounced in the matter by the Right Hon. Mr. Justice Moore at the Armagh Summer Assizes, 1921, on an appeal from the decree of the County Court Judge of the County of Armagh made herein, and dated the 28th day of June, 1921, coming on to be heard this day in the presence of counsel for the respondents and counsel for the applicant upon a case stated by the said learned Judge of Assize, the question arising on the said case for the decision of the Court being whether the said learned Judge, having regard to the decision of His Majesty's Court of Appeal in Ireland in the case of *Kirby* v. *Kerry County Council* (2), was bound on the facts in the said case set forth to affirm the said decree of the said County Court Judge, whereupon and on reading the said case stated, and the documents incorporated therewith, and the notice of setting down the same for hearing, dated the 30th day of July, 1921, and the Court being of opinion that the said learned Judge was so bound, it is accordingly ordered that this appeal do stand dismissed with costs, and that the said decree of the County Court Judge do stand affirmed. And it is ordered that the respondents do pay to the applicant his costs of this appeal when taxed by the Taxing Master, and that the same be raised by the respondents off the said County of Armagh at large."

The case stated by the Right Hon. Mr. Justice Moore, sitting as Judge of Assize at the Summer Assizes, 1921, for the County of Armagh, set out that the applicant, William Leyburn, obtained from

(1) In the High Court of Appeal for Ireland, before SIR JOHN ROSS C., MOLONY C.J., and ANDREWS L.J.

(2) [1921] 2 I. R. 388.

High Court of Appeal. 1921.

LEYBURN v. ARMAGH CO. COUNCIL.

the County Court Judge for the County of Armagh a decree made on the 28th day of June, 1921, for the sum of £19 for wantonly and maliciously seizing and carrying away of a gun and other chattels, and for the wantonly and maliciously damaging of two hats by a large number of armed and disguised raiders, together with a sum of £3 19*s.* for costs, and 10*s.* witnesses' expenses.

From this decree the said County Council appealed, and the appeal was heard before Moore J. as Judge of Assize for the County of Armagh on the 11th day of July, 1921, who held that the evidence showed an organized robbery on a large scale. Counsel for the applicant relied upon the decision of the Court of Appeal in the case of *Kirby* v. *Kerry County Council* (1), as entitling the applicant to compensation for malicious damage, though no injury beyond the loss of the goods and the damage to the hats was proved. Moore J. affirmed the decree, but gave special leave to appeal to the Court of Appeal by way of case stated upon the terms that in any event the applicant's costs of such appeal by way of case stated should be borne and paid by the County Council.

Charles Murphy, for the respondent:—

By way of preliminary objection to this appeal, I submit that the right of appeal to this Court, given by sect. 43, sub-s. 1, of the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), does not give this Court jurisdiction to hear the appeal in the present case. Therefore this appeal is incompetent. Sect. 8 of the County Court Appeals (Ireland) Act, 1889 (52 & 53 Vict. c. 48), empowers the Judge of Assize on the hearing of an appeal brought under the provisions of that Act to give special leave to appeal to the Court of Appeal on a question of law, and provides that the decision of that Court shall be final and conclusive. Sect. 43, sub-s. 1, of the Government of Ireland Act, 1920, gives a general right of appeal from orders of the Courts of Appeal in Southern and Northern Ireland, but that general right of appeal does not affect the special right of appeal given in a particular case by a previous statute. In this case, therefore, there is no appeal except the appeal to the Court of Appeal in Southern Ireland, which is made by the statute final and conclusive. The origin of the right of appeal is to be found in sect. 5 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37) [Read sub-s. 4], and provides that subject to that Act, and to Rules of Court, the County Courts (Ireland) Acts, 1851 to 1889, shall apply in like manner as in the case of any other appeal. Sect. 8 of the County Court Appeals Act, 1889, then provides that the appeal to the Court of Appeal in cases such as this shall be final and conclusive. Rules were made by the rule-making authority in 1900, pursuant to the provisions of the Local Government Act, 1898; but the operative rules now in force are contained in Order 59, rules 61–80 inclusive, of the Rules of the High Court. The rule applicable to this case is rule 73 (Wylie's Judicature Acts, p. 824), and statutory rules have the effect of an Act of Parliament.

On the question of the jurisdiction of this Court to hear the appeal, the principle I rely on is Generalia specialibus non derogant. A general later law does not abrogate an earlier special one by mere implication.

(1) [1921] 2 I. R. 388.

J. C. Davison, for the appellant:—

The general principle contended for by the respondent does not affect the right of appeal in this case. It is clear from the authorities that the paramount consideration is the intention of the Legislature. The Court may consider all the circumstances to find out what was the intention of the framers of the later statute. The Supreme Court of Judicature in Ireland under the provisions of the Government of Ireland Act, 1920, ceased to exist. New Courts were established; and this Court was established as a supreme Court having jurisdiction over all Ireland with the object of obtaining uniformity of decision. The section of the Government of Ireland Act, 1920, giving an appeal to this Court in every case is the overruling enactment which gives the key to the intention of the Legislature. The Government of Ireland Act of 1920 does not substitute the new Courts of Appeal in Southern and Northern Ireland for the old Court of Appeal. Sect. 39 declares that the Supreme Court is to cease to exist, and it substitutes therefor three Courts—the Supreme Court of Southern Ireland, the Supreme Court of Northern Ireland, and the High Court of Appeal. The form of this section suggests that part of the jurisdiction of the old Supreme Court is transferred to the new High Court of Appeal. Sect. 39 enacts that the new Court of Appeal in Southern Ireland shall in Southern Ireland exercise all the jurisdiction now exercised by the Court of Appeal in Ireland; but this must be read along with and subject to sect. 43, which enacts that an appeal is to lie from any decision of the Court of Appeal in Southern Ireland. Sect. 49 also shows that the Act in providing an appeal to the House of Lords in cases where the decision of the old Court of Appeal was final shows that the Act contemplates these cases being by the Act subject to appeal to the new High Court of Appeal without any express provision other than sect. 43.

[Authorities cited and discussed:—*Harvey, appellant*; *Copeland, respondent* (1); *Stradling* v. *Morgan* (2); *Hawkins* v. *Gathercole* (3); *Conservators of the Thames* v. *Hall* (4); *Dodds* v. *Shepherd* (5); *Garnett* v. *Bradley* (6); *Seward* v. "*Vera Cruz*" (7); *Barker* v. *Edger* (8).]

Cur. adv. vult.

1922. Jan. 16.

SIR JOHN ROSS C.:—

In this case a preliminary point has been raised that this Court has no jurisdiction to hear the appeal. It is contended that the general words in sect. 43, sub-s. 1, of the Government of Ireland Act have not repealed the earlier special statute, which provided that the decision of the former Court of Appeal in Ireland should be final in the case of applications for compensation for criminal injuries to property.

The principles governing the point raised have been definitely settled by many decisions.

I refer to the words of Lord Selborne in *Seward* v. "*Vera Cruz*" (7): "If anything be certain it is this, that where there are general words

(1) 32 L. R. Ir. 419.
(2) 1 Plow. Repts. 204.
(3) 6 D. M. & G. 1.
(4) L. R. 3 C. P. 415.
(5) 1 Exch. Div. 75.
(6) 3 A. C. 944.
(7) 10 A. C. 59, at p. 68.
(8) [1898] A. C. 748.

High Court of Appeal. 1922. LEYBURN v. ARMAGH CO. COUNCIL. Sir J. Ross C.

in a later statute capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." That intention may be manifested in explicit language, or there may be something in the general Act tending to show that an exception was not intended in the case of the special Act.

In order to discover what was the intent and meaning of the Legislature in sect. 43 of the general Act, we are at liberty to consider the general scope of the Act and its particular provisions. As regards the general scope of the Act, we must consider what are the institutions which the Act sets up. It creates two Legislatures and Executives in Ireland, the powers of which are defined by a written instrument—the Act itself. It is imperative that a strong tribunal should exist for the interpretation of that written instrument. Here we have the case of two non-sovereign law-making bodies, and in the very nature of things there must be some person or persons, judicial or otherwise, having authority to pronounce upon the validity under the constitution of laws passed by either law-making body. The creation of a Council of Ireland has an important bearing on the matter in question. It is not intended to be a permanent institution: it is intended to come to an end on the date of Irish union (sect. 3, sub-s. 2.) It is created with a view to the eventual establishment of a Parliament for the whole of Ireland, and to bringing about harmonious action between the Parliaments and Governments of Southern Ireland and Northern Ireland, and to the promotion of mutual intercourse and uniformity in relation to matters affecting the whole of Ireland. Until union is effected, it contemplates a developing federal system of government in Ireland. When the object is attained, and when the federal system ceases, it is suggested in sect. 47 that this Court may come to an end by abolition or merger.

All this leads us to the conclusion that this central Court is absolutely necessary for the determination of the mutual rights and obligations of the component parts of the federation. In every federal system, such as the United States, the Australian Commonwealth, a Court of this kind is absolutely essential. It is the supreme guardian of the constitution, and the pivot upon which all the constitutional machinery turns. This duty is not expressly stated in the constitution of the United States or the Commonwealth, but it of necessity is implied. The sections in the Act all support this view. In sect. 50 of the Act the duty is expressly imposed on this Court, where any decision of a Court in Ireland involves the decision of any question as to the validity of any law made by either Parliament. By sect. 38 this Court is given appellate jurisdiction throughout the whole of Ireland. In sect. 44 the Lord Chancellor, the President of the Court, ceases to exercise executive functions. This indicates an intention to keep the central tribunal in the federal system free from political influences. Under sects. 39 and 40 of the Government of Ireland Act all the jurisdiction as now exercised by His Majesty's Court of Appeal in Ireland is transferred to the Courts of Appeal in Southern and Northern Ireland, but there is no transfer of existing appellate jurisdiction to the

High Court of Appeal. There is a marked difference in this respect between the Government of Ireland Act and the Judicature Act of 1877, since the latter by sect. 23 specifically transferred the existing appellate jurisdiction to the then new Court of Appeal in Ireland. The High Court of Appeal is consequently a Court separate and distinct from the Courts existing at the passing of the Act. There is nothing in the sections to indicate that it is a substitution for any existing Courts. Under sect. 49 (*b*) an appeal lies from the High Court of Appeal to the House of Lords in cases taken by way of certiorari, mandamus, quo warranto, and prohibition. In all these cases the decision of the former Court of Appeal was final. Of course these cases must pass through the High Court of Appeal to reach the House of Lords.

The decision of the former Court of Appeal was declared to be final in the following matters:—(A) Cases stated by a Chancery Judge or by a Judge of Assize or County Court Judge in equity and probate matters under the County Courts Appeals Act of 1889, sect. 8. (B) Appeals as regards the registration of voters. It would appear to be a peculiar anomaly if the High Court of Appeal were unable to review such decisions. In view of the ultimate unity of the country, as contemplated by the Act, uniformity of the law is of the first importance in all matters of this kind, and that could only be secured by the action of the High Court of Appeal exercising jurisdiction over all Ireland. These considerations go to show that the Legislature intended that the right of appeal given by sect. 43 should not be limited by previous legislation. We are, therefore, of opinion that the preliminary objection to our jurisdiction fails, and that the appeal should be allowed to proceed.

MOLONY C.J.:—

I have had the advantage of reading the judgment delivered by the Lord Chancellor, and I agree with it.

ANDREWS L.J.:—

The preliminary objection which Mr. Murphy on behalf of the applicant has raised to our jurisdiction to entertain this appeal is one of some importance; but it may, in my opinion, be shortly disposed of, as there is no real controversy as to the well-settled principles of law established by the cases which have been cited to us. The only dispute is as to the application of these principles to the special facts of this case.

Sect. 5 of the Local Government (Ireland) Act, 1898 (1), which transferred to the County Court the business of Presentment Sessions and Grand Jury in relation to compensation for criminal injury, confers upon certain specified aggrieved persons a right of appeal to the Judge of Assize, and further provides that, subject to that Act and to rules of Court, the County Courts (Ireland) Acts, 1851 to 1889, shall, except in so far as they require security to be given, apply in like manner as in the case of any other appeal. Section 8 of the County Court Appeals (Ireland) Act, 1889 (2), empowers the Judge of

(1) 61 & 62 Vict. c. 37. (2) 52 & 53 Vict. c. 48.

High Court of Appeal. 1922.

LEYBURN v. ARMAGH CO. COUNCIL.

Andrews L.J.

Assize on the hearing of an appeal brought under the provisions of that Act to give special leave to appeal to the Court of Appeal on a question of law, and also provides that the decision of that Court shall be final and conclusive.

Appeals in cases in which such special leave is given are by Order 59, rule 73, brought on a case stated to the Court of Appeal; and this rule also expressly recognizes the final and conclusive character of the decision of such Court. It was under such statutory provision and rule of Court that this special case was stated by Moore L.J.

In support of the right to appeal to this Court counsel for the County Council relies upon sect. 43, sub-s. 1, of the Government of Ireland Act, 1920 (1), which enacts that an appeal shall lie to the High Court of Appeal for Ireland from any decision of the Court of Appeal in Southern Ireland or the Court of Appeal in Northern Ireland, and that such High Court of Appeal shall have jurisdiction and power to hear and determine all such appeals, subject to the rules or orders of the Court. On behalf of the applicant, however, it is contended that the right of appeal so conferred is general in its character, and that, as it has ample subject-matter upon which to operate in other classes of cases, this merely affirmative enactment is not to be construed as impliedly repealing the provisions of sect. 8 of the County Court Appeals (Ireland) Act, 1889 (2), as to the final and conclusive character of the decision of the Court of Appeal.

In the view which I take of this case it is unnecessary for me to review the several authorities cited to us. The law is too clear to be questioned that an Act directed towards a special object or special class of objects will not be repealed by a subsequent general Act embracing in its generality those particular objects unless some reference be made directly or by necessary inference to the preceding special Act. An implied repeal of an earlier by a later statute can only be effected by a necessary inconsistency between them, or by a manifest intention to do so. It is only where the words of the second statute are such as necessarily to import a contradiction, that is to say, where one can see that it must have been intended that the two should be in conflict, that the second repeals the first. In ascertaining such intention it is not only competent but proper and necessary to have regard to the object contemplated by the Legislature in passing the second Act, or to what Lord O'Hagan calls in *Garnett* v. *Bradley* (3) "the purpose of Parliament." This can frequently, as in the present case, be best ascertained by considering the changes in the law which the second Act effects.

Applying these tests to the Act of 1920 we find that, as ancillary to the proposals for the establishment of separate Parliaments for Southern and Northern Ireland, it was deemed by the Legislature both desirable and necessary to create separate Courts of Justice for these respective areas, entitled the Supreme Courts of Judicature of Southern and Northern Ireland respectively. Sect. 38 of the Act, which established these Courts, also terminated the existence of the Supreme Court of Judicature

(1) 10 & 11 Geo. 5, c. 67. (2) 52 & 53 Vict. 48.
(3) 3 A. C. 944, at p. 960.

in Ireland, and further brought into being this Court under the title of the High Court of Appeal for Ireland. Sects. 39 and 40 create two divisions of such new Supreme Courts for the Southern and Northern areas respectively, one of such divisions being called His Majesty's High Court of Justice in Southern Ireland (or Northern Ireland, as the case may be), and the other His Majesty's Court of Appeal in Southern Ireland (or Northern Ireland, as the case may be); and upon such respective Courts of Appeal is conferred in their respective areas all such jurisdiction as was then exercised by His Majesty's Court of Appeal in Ireland.

The Supreme Court of Judicature in Ireland, whose existence was thus determined, was constituted by sect. 4 of the Supreme Court of Judicature Act (Ireland), 1877, and consisted of two divisions known as "His Majesty's High Court of Justice in Ireland" and "His Majesty's Court of Appeal in Ireland" respectively (sect. 5). It was to such Court of Appeal, which has now become defunct, that appeals could be taken by way of case stated under sect. 8 of the County Court Appeals (Ireland) Act, 1889, and Order 59, rule 73, above referred to. In making its decision final and binding the Legislature merely intended that no appeal would lie from its decision to the House of Lords.

In its place we have now created the two Courts of Appeal for the Southern and Northern areas, and a High Court of Appeal for Ireland, the personnel of which consists of Judges drawn from both Southern and Northern Ireland. The object which the Legislature had in view in establishing this High Court of Appeal, and in conferring upon it by sect. 43 jurisdiction and power to hear and determine appeals from all decisions of the Courts of Appeal in Southern and Northern Ireland respectively, was obviously to ensure as far as possible uniformity of decision in the administration of the law; and this object would be entirely defeated so far as concerns this now most important branch of the law—the law relating to compensation for criminal injuries—if we were to yield to Mr. Murphy's argument. In no case which he has cited to us are facts to be found at all similar to those with which we have to deal here, where the very existence of the Court whose decision is by the earlier statute made final and conclusive is terminated by the same Act as creates the Court to which this appeal is now brought. Our decision will not in effect confer any greater right of appeal than formerly, for it will not involve any right to appeal to the House of Lords (sect. 49). But it will secure what, in my opinion, Parliament clearly intended, namely, that cases such as this, which could under the judicial system formerly existing in Ireland be brought before the highest Court which then existed in this country, should in future be also capable of being taken to the highest Court under the judicial system which now obtains in this country, and which in a large measure was intended by the Legislature to discharge the functions of the Court which it superseded.

For these reasons I agree with my colleagues in holding that we should proceed to hear the appeal.

Solicitors for the applicant: *Monroe and Anderson.*
Solicitor for the respondent: *Henry J. Harris.*

H. J. M'C.

Appeal.
(S. I.)
1921.

Nov. 25, 28.

WILLIAM JOSEPH READE, Plaintiff; THE ROYAL BANK OF IRELAND, Limited, Defendants (1).

Banker and customer—Cheque drawn in payment of gambling debt—Countermand of cheque—Payment by bank notwithstanding countermand—Liability.

The plaintiff had a current account in the defendants' bank, which was in funds. The plaintiff drew a cheque on this account in payment of a gambling debt, but prior to its presentation countermanded by telegram payment of the cheque. Notwithstanding the countermand, the defendants subsequently honoured the cheque on presentment. The plaintiff did not sue the payee of the cheque for the recovery of the money, nor did he prove that he could not have recovered from the payee.

Held, by the Court of Appeal, that the defendants were guilty of a breach of duty as bankers, and that the plaintiff was entitled to recover from them the amount of the cheque.

New Trial Motion in which the plaintiff sought an order that the verdict found and the judgment given for him at the trial of the action might be set aside in so far as the judgment assessed the plaintiff's damages at the sum of one shilling, and that in lieu thereof judgment might be entered for the plaintiff for the sum of £460 damages, or, in the alternative, for a new trial. The statement of claim was as follows:—

"1. The defendants are bankers, and carry on business as such at Foster Place, in the City of Dublin; and the plaintiff employed the defendants as his bankers, and kept a banking account with them which was current on the dates hereinafter mentioned.

"2. On the 5th August, 1920, the plaintiff drew upon the defendants a cheque in favour of one F. L. M'Entyre or order for the sum of £460, and handed the said cheque so drawn as aforesaid to the said F. L. M'Entyre.

"3. Before the said cheque was presented to the defendants for payment, the plaintiff instructed and required the defendants to refuse payment thereof, yet the defendants, with full knowledge and notice of the plaintiff's having so countermanded payment of the said cheque, wrongfully, negligently, and in breach of their duty as bankers towards the plaintiff paid the amount of the said cheque—videlicet, £460—to the said F. L. M'Entyre on presentation thereof to them, and have debited the plaintiff's said banking account with the said sum.

"The plaintiff claims £500 damages."

The defendants by their defence traversed the plaintiff's claim, and pleaded contributory negligence inducing the defendants to pay the cheque.

The action was tried by Samuels J., without a jury, on the 24th June, 1921.

The plaintiff, in his evidence, stated that he had two accounts with the defendants, No. 1 and No. 2, the second account being in credit.

(1) In the Court of Appeal, before Ronan and O'Connor L.JJ., and Dodd J.

In August, 1920, he was at Galway Races, and on the evening of the 3rd August at an hotel he engaged in playing cards for high stakes with two acquaintances, one of whom was named F. L. M'Entyre. The plaintiff lost to M'Entyre, and in settlement of his losses he drew a cheque for £460 in favour of M'Entyre on his No. 2 account in the defendants' bank, which cheque he handed to M'Entyre. On the 4th August he sent the following telegram to the defendants: "Stop my cheque, 50635, drawn for M'Entyre. Reade." This telegram was admittedly received by the defendants, who, nevertheless, on the cheque being presented for payment by M'Entyre on the 6th August, honoured the cheque.

Gibson K.C. applied for a direction on behalf of the defendants, on the ground that the defendants' authority to pay was not countermanded; that a telegram is not sufficient countermand under the Bills of Exchange Act, sect. 75, sub-s. 3; that this telegram was not a sufficient countermand; that there was no evidence of negligence on the part of the defendants; that there was no evidence of damage; and that the plaintiff was not entitled to recover on account of his contributory negligence in that his telegram did not mention the particular account on which the cheque was drawn, and that he did not confirm it by letter.

The learned Judge declined to direct.

It was proved on behalf of the bank that the cheque was stopped as against plaintiff's No. 1 account, but not against his No. 2 account.

The learned Judge held that the plaintiff had not discharged the onus of proving any loss in the action, as he had not sued M'Entyre for the £460, or proved that he was unable to recover the money from him, but inasmuch as there had been a breach of contractual obligation on the part of the defendants in not stopping the cheque effectively, he awarded the plaintiff the sum of one shilling by way of nominal damages. Hence this application.

Blood K.C. (with him *E. S. Murphy K.C.* and *Rearden*), for the appellant:—

The Judge was wrong in allowing only nominal damages. A principal is entitled to recover the actual loss incurred by the default or neglect of his agent, and the wrongful debiting of the plaintiff's bank account with the £460 showed the true measure of damage, and that sum should have been awarded. The plaintiff was not bound to proceed against M'Entyre before suing the bank, even if M'Entyre's liability to the plaintiff was clear, which it was not. The question of such liability was *res inter alios acta*, and evidence as to it was irrelevant and inadmissible on the issue of the amount of damages. Besides, there is no authority for the proposition laid down by Samuels J. The dicta of Bayley J. and Holroyd J. in *Morris* v. *Robinson* (1), to which Samuels J. referred, have found no support in any later decision, and were not necessary for the decision in that case. They have been expressly dissented from in Mayne on Damages (9th ed., p. 111) and in Arnold on Damages (pp. 24 and 25). None of the other cases on which Samuels J. relies is an authority for the view on which he grounds his award of nominal damages. They are

(1) 3 B. & C. 196.

Appeal. (*S. I.*) 1921.

READE v. ROYAL BANK OF IRELAND.

all cases in which it has been decided that it is the duty of a plaintiff complaining of breach of contract not to disregard any opportunity in connexion with the circumstances of that particular case to take all proper steps to minimize his loss, but they impose no obligation on a plaintiff to proceed in the first instance against a third party in respect of a totally independent liability. The liability of M'Entyre to the plaintiff was not by any means clear, and depended at the date of the trial on a case (then under appeal in the House of Lords) of *Sutters* v. *Briggs* (1).

No evidence was, in fact, tendered by the bank or given at the trial to show that M'Entyre was even solvent, and yet the Judge has found as a fact, in the absence of any evidence on the subject, that M'Entyre would have paid the £460 if applied to by the plaintiff for it.

This Court can enter judgment for the £460 without sending the case for a new trial, and ought to do so.

Gibson K.C., *Swayne K.C.*, and *Dockrell*, for the respondent.

RONAN L.J. :—

The question in this case is rather obscured by the form of the pleadings, but this is immaterial, as the only matter of fact in dispute—viz., was there an effectual countermand prior to payment?—was decided by the Judge, and defendants do not question that decision. The statement of claim is as follows [His Lordship referred to the Statement of Claim, and continued]:—

The defence practically denies every allegation in the statement of claim, with one significant exception. The defendants do not deny that they "have debited the plaintiff's said banking account with the said sum."

It is plain to my mind the action was brought to try whether they were entitled to do so. The relation between the plaintiff and the defendants was that of debtor and creditor. At the date of the payment of the cheque the defendants were indebted to plaintiff in a sum equal to or greater than £460, the amount of the cheque. On the 6th of August the bank, out of these moneys, paid M'Entyre a sum of £460. Lord Cottenham says in *Foley* v. *Hill* (2): "Money, when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker . . . . The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases . . .; but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands."

If the sum of £460 was paid to M'Entyre at the request of the plaintiff, the defendants would be entitled to debit him with the payment. The ordinary request in such cases is a cheque. Let me first assume that there was no request and no cheque at all. M'Entyre comes into the bank and says, "Reade owes me £460; you owe him more than that; pay me my debt, and debit him with the amount. I have a writ against him for the amount, and, if you will not pay, I will serve

(1) [1921] W. N. 304.

(2) 2 H. of L. Cas., 28, at pp. 36, 37.

it at once." The bank pays. Can they then justify the debit to Reade by saying, "You suffered no damage. If we had not paid, you would have had to pay the debt and costs in addition"?

If the alleged debt of M'Entyre was a doubtful or unenforceable debt, would the position of the bank be better? Can they then say, "Even if you don't owe the debt, you can probably get the money we paid M'Entyre back from him by an action. This may involve some trouble and cost, but we give you one shilling to cover this." Surely these are impossible propositions, which only require to be stated. A bank has no authority or right whatever to make payments to a customer's creditors, and debit his account therewith, unless at his request, express or implied, or under a garnishee or other order of the Court. The payment being out of their own moneys, was made at their own risk. It was the debit to the plaintiff that was wrongful.

On the other hand, if the cheque in this case had not been countermanded, the bank would have been entitled to debit his account with amount. They had no notice of the transactions which led to the giving of the cheque. But what was the effect of the countermand? Sect. 75, sub-s. 1, of the Bills of Exchange Act, 1882, says [the Lord Justice read it]. Four years before the case of *Cohen* v. *Hale* (1) was decided. It is cited as applying to the section by Sir M. Chalmers, and referred to in Hart on Banking as the existing law. I take the statement of the case from pp. 326-7 of that book. This puts the case in the same position as if the payment had been made without any cheque for the amount having ever existed. It follows, therefore, that as between the plaintiff and the defendant the case must be treated precisely in the same way as I have dealt with the case of no cheque and no request. The question here would directly arise if the plaintiff brought an action of debt for his balance, and the bank sought to set off this payment pro tanto. I cannot see what possible application to such a case the cases as to the duty of plaintiff in an action for damages for breach of contract to minimize his loss can have. This never was really an action for unliquidated damages. It was an action to determine whether the liquidated sum of £460 was due by defendants to the plaintiff or not. If the view of Samuels J. was right, he should, in my opinion, have given the defendants the costs of the action, and the plaintiff the costs of the issue as to the countermand. We are all agreed that his decision must be set aside, and that the plaintiff is entitled to succeed on the real question in the action, and that the defendants should pay his costs in this Court and in the Court below. As to the form of the order we should make, I differ from my colleagues.

The plaintiff claims damages because the defendants have wrongfully debited him with £460. Samuels J. decided that he was to get one shilling damages for this, but his judgment was plainly rested on the assumption that the wrongful debit should stand as a valid debit, though the judgment does not say so. The order I would make in this case would be—1, discharge the order and judgment of Samuels J.; 2, declare that the defendants were not and are not entitled to debit the plaintiff with the sum of £460; 3, costs. The plaintiff is willing to accept this order, and makes no claim for damages for the

(1) L. R. 3 Q. B. 371.

Appeal. (*S. J.*) 1921.

READE *v.* ROYAL BANK OF IRELAND.

Ronan L.J.

period the debit was insisted on. My colleagues, as I understand, prefer to make an order that the invalid debit shall be treated as valid, but that the defendants shall pay the plaintiff £460 damages for the wrongful debit; of course their view must prevail. I dislike differing from my colleagues in such a matter, but I cannot agree to declaring a debit valid when our entire judgment rests on its invalidity. If any amendment of the pleadings is necessary, I think we are bound to make it under the mandatory provisions of Order 28, rule 1, and sect. 7 of the Judicature Act.

Having regard, however, to some observations of Samuels J., I think it right to say that I confine my judgment in this case to the question between the parties. I do not decide that the existence of the cheque may not affect the rights of either of the parties against M'Entyre, and in his absence I prefer not to express any opinion as to these rights, if any. At the same time, I may say that I fail to see how the plaintiff could recover back the cash paid by the bank to M'Entyre, except by adopting the payment by the bank as his payment, and thereby abandoning his claim against the bank for the wrongful debit.

O'CONNOR L.J.:—

I think that once the facts of this case are clearly appreciated, and the claim of the plaintiff and the answer of the defendants properly understood, no legal difficulty whatever arises.

The facts are fully found by the learned Judge who tried the action. Let me summarize them. The plaintiff, having bad luck at a game of cards, gave a cheque on the defendants' bank for £460 to one M'Entyre, the amount of the plaintiff's losses to that individual. Before the cheque was presented for payment, the plaintiff repented of having given it, and sent a telegram to the defendants countermanding it. Now, it is as clear as anything can be that this telegram, in the circumstances of this case, was an effective countermand, and that it reached the defendants in ample time to enable them to act upon it. This appears obvious from the evidence; it is clearly found by the Judge; and, indeed, so much is, in effect, admitted by the defendants. By a blunder on the part of one of the defendants' clerks, the cheque was paid to M'Entyre on presentation. The bank say they are under no liability to the plaintiff, and that is the issue we have to decide.

The statement of claim of the plaintiff is liable to lead to some confusion, which, I am inclined to think, was increased in the conduct of the case. For the claim does use the word "negligently" in describing the payment, and there was obviously a good deal of controversy before the learned Judge as to negligence and the consequences thereof. But that, in my judgment, is not the way to view this case at all.

The relation of a bank to its customer is that of debtor to creditor. A bank can, and, indeed must, diminish its indebtedness to the customer by obeying the mandate of the customer to pay away to third parties moneys up to the amount which the bank owes the customer, or, in other words, which is standing to the credit of the customer's

current account. The mandate is, of course, usually given by cheque. But a bank cannot diminish its indebtedness where no such mandate is given, or where a mandate is given but subsequently withdrawn, for that is the same as if no mandate were given at all.

Here there was no mandate, for the mandate which was given was withdrawn, and yet the bank claim that they have diminished their indebtedness to the plaintiff by the amount which the bank, out of their own money, paid to M'Entyre. I fail to understand their position.

Apparently, they contended before Samuels J. that if they were liable to the plaintiff in the amount of the cheque, the plaintiff would have a good chance of being paid twice over, once by the bank and once by M'Entyre, if the plaintiff choose to take an action against M'Entyre for the amount of the cheque, on the authority of a recent House of Lords decision. Not at all. The plaintiff repudiated this payment by the bank to M'Entyre; he still repudiates it; he says it is not a payment by him to M'Entyre at all, but a wholly mistaken and unauthorized payment by the bank; and that being so, his remedy, treating the bank as his debtor, begins and ends with them. If the bank have such perfect faith as they suggest in M'Entyre's solvency, they can take appropriate proceedings against him; and, though it is none of my business to advise the bank, I should be, as at present advised, disposed to think that an action for money received by M'Entyre for the use of the bank—it being paid to him in mistake—would lie.

I say nothing as to the decisions cited, for they seem to me to have nothing to do with this case.

As to the form of our order, I think it is immaterial whether the judgment should be for £460 as money due, or for £460 damages for the wrongfully debiting by the bank of the plaintiff's account with them.

DODD J. concurred.

Solicitors for the plaintiff: *Bowles & French.*
Solicitors for the defendants: *Orpen & Sweeney.*

R. ST. J. C.

K. B. Div.
1921.
May 26.
June 30.
Appeal.
(*S. I.*)
Nov. 8.
Dec. 19.

JANE WYCHERLY *v.* DENIS FLYNN (1).

Revenue—Income tax—Landlord and tenant—Deduction from rent—Contract—Void covenant—Income Tax Act, 1842 (*5 & 6 Vict. c.* 35), *sects.* 73 *and* 103—*Income Tax Act*, 1918 (*8 & 9 Geo.* 5, *c.* 40)—*All Schedules, Rules, R.* 23.

By lease dated February 1st, 1894, premises were demised by a landlord to a tenant at a yearly rent of £22 "over and above all taxes, rates, charges, and impositions whatsoever (quit rent and Crown rent excepted)." The lease also contained a provision the effect of which was that if the tenant would pay "all rates, taxes, charges, assessments, and impositions of every nature and kind whatsoever assessed upon or payable out of or in respect of said premises by either the landlord or tenant in respect thereof, whether Parliamentary or otherwise, including the whole of the county cess and poor-rate, or any rate struck or levied under the Public Health Acts," the lessor would at all times during the continuance of the demise accept and take from the lessee the yearly rent of £14, instead of the reserved yearly rent of £22. Until 1920 the lessor accepted the rent of £14, and paid landlord's income tax herself. In 1920 the tenant was compelled to pay landlord's income tax, and the landlord refused to accept the reduced rent less income tax. Save in respect of landlord's income tax, the tenant had complied with all the requirements of the provision in the lease.

Held (reversing the King's Bench Division, O'Connor M.R. dissenting), that the tenant discharged his obligation under the demise by paying the reduced rent less by the amount of the landlord's income tax, which he was compelled to pay, and that a contract not to deduct would be void under All Schedules Rules, R. 23, Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40).

Per Ronan L.J.: The broad principle of the Income Tax Code is that the landlord must give the tenant credit for the tax out of any rent the tenant pays him; and this ought not to be evaded by the device of having both a real and imaginary rent in a lease.

CASE STATED.

This was an appeal heard by Mr. Justice Samuels at the Cork Summer Assizes, 1920, against a dismiss pronounced by the Recorder of Cork and County Court Judge of the East Riding of Cork.

The case stated set out the facts as follows:—

The defendant held as tenant to the plaintiff a dwelling-house and yard situate at Denroche's Cross, in the City of Cork, under a lease dated the 1st day of February, 1894, for a term of 190 years, at a rent of £22 a year, reducible, as appeared in the said lease, to £14 a year. The terms of the redendum of said rent of £22 are as follows:—"Over and above all taxes, rates, charges, and impositions whatsoever (quit rent and Crown rent excepted)." The said lease also contains the following provisions:—"If the lessee, his executors, administrators, and assigns shall and will, well and truly, observe all covenants and conditions hereinbefore contained, and also pay and satisfy all rates, taxes, charges, assessments, and impositions of every nature and kind whatsoever assessed upon, or payable out of or in respect of the said premises by either the landlord or tenant in respect thereof, whether

(1) In the King's Bench Division, before MOLONY C.J. and MOORE J.

Parliamentary or otherwise, including the whole of the county cess and poor-rate, or any rates struck or levied under the Public Health Acts, and shall and will construct at his and their own cost and expense all necessary drains and other sanitary work as may be necessary to satisfy for the time being the requirements of the sanitary authorities, and will cleanse and keep in good order same during the said term, and from payment of all such rates, taxes, charges, and impositions, as aforesaid, and from all liability, fines, penalties, costs, and charges in respect of such sanitary works, will during the said term save harmless and keep indemnified the lessors, their executors, administrators, and assigns, and their property, that then and in such events they the said lessors, their executors, administrators, or assigns shall and will at all times hereinafter during the continuance of this demise accept and take from the said lessee, his executors, administrators, and assigns the yearly rent or sum of £14 in lieu of the said hereinbefore reserved yearly rent or sum of £22, the same to be paid on the same days and times, and in the same proportions as are hereinbefore mentioned and appointed for payment of said reserved yearly rent of £22, anything herein contained to the contrary in anywise notwithstanding."

The plaintiff since the commencement of the tenancy accepted the reduced rent of £14, and did not require the defendant to pay the lessor's income tax.

In the year 1920 the plaintiff required the defendant to pay the said income tax, and the defendant was compelled by the revenue authorities to do so to the amount of £1 16*s.*, which amount he claimed to be entitled to deduct from the half-year's rent of £7.

It was admitted that, save in respect of the landlord's income tax, the defendant had complied with all the requirements of the provision.

On the 19th day of April, 1920, a civil bill was issued against the defendant at the suit of the plaintiff, claiming the sum of £11, being one half-year's rent up to the 1st day of January, 1920. The defendant paid £5 4*s.* into Court.

This civil bill was dismissed with costs by the Recorder on the 10th day of May, 1920. The plaintiff appealed.

I was of opinion that the dismiss ought to be affirmed, but at the request of counsel for the plaintiff I have stated this case. Should I have been erroneous in my opinion, the dismiss pronounced by the Recorder will be reversed, and there will be a decree for the plaintiff for £7 with costs, less the £5 4*s.* lodged in Court, which, by consent, was paid out to plaintiff.

The question for the Court is whether, under the foregoing circumstances, the defendant is bound to pay the lessor's income tax in order to be entitled to the benefit of the provision for reduction of the rent to £14 per annum.

The lease and civil bill are to be taken as incorporated with the case.

Rearden, for the applicant.

Conner K.C. and *H. Moloney*, for the defendant.

The arguments and authorities cited were the same as those in the Court of Appeal (infra).

Cur. adv. vult.

K. B. Div. 1921.

WYCHERLY v. FLYNN.

MOLONY C.J. :—

By indenture of lease dated the 1st day of February, 1894, Joseph Wycherly and Jane Wycherly demised to the defendant certain premises in the City of Cork, to hold for a term of 190 years, at the yearly rent of £22, to be paid by two equal half-yearly payments on every 1st day of January and 1st day of July, over and above all taxes, charges, and impositions whatsoever (quit rent and Crown rent only excepted). The said lease contains the usual covenants for distress and re-entry, and also a covenant to pay the said reserved yearly rent.

At the end of the lease there is, however, a further covenant, which is referred to in the case stated, the effect of which is that if the tenant will pay "all rates, taxes, charges, assessments, and impositions of every nature and kind whatsoever assessed upon, payable out of, or in respect of the said premises by either the landlord or tenant in respect thereof, whether Parliamentary or otherwise, including the whole of the county cess and poor-rate, or any rate struck or levied under the Public Health Acts," and shall also do the other acts therein mentioned, the lessors would at all times during the continuance of the demise accept and take from the lessee, his executors and administrators, the yearly rent or sum of £14, instead of the said reserved yearly rent of £22.

It appears that the plaintiff, since the commencement of the tenancy, accepted the reduced rent of £14, and paid the lessor's income tax herself until 1920. The defendant in that year was compelled to pay the sum of £1 16s. to the revenue authorities, and claimed to be entitled to deduct such sum from the half-year's rent of £7. The plaintiff refused to accept the £5 4s. which was offered to her, and on the 19th April, 1920, issued a civil bill claiming the sum of £11, being one half-year's rent up to the 1st January, 1920, and the defendant thereupon paid the £5 4s. into Court.

The Recorder dismissed the said civil bill with costs, and the plaintiff appealed to the Judge of Assize, who has stated the present case.

The defendant was, of course, compelled to pay the income tax; but under the provisions of the Income Tax Act, 1918, Schedule A, No. 8, Rule 1, he became entitled to deduct the amount thereof out of his next payment of rent, and Rule 23 of the General Rules of the Schedules to the Income Tax Act, 1918, provides in express terms, not only that the person who refuses to allow a deduction of the tax shall forfeit a sum of £50, but also that every agreement for payment in full without allowing such deduction shall be void.

It is admitted in the present case that the condition under which the rent is to be reduced to £14 casts upon the tenant the obligation of paying the income tax; but it is contended that the provision, in so far as it affects income tax, is void, and that the defendant is entitled to rely upon the provisions of Rule 23, and to discharge his obligation by paying the reduced rent of £7, less by the amount of the income tax.

If the rent of £14 was the only rent reserved by the lease, there is no doubt that it would be held that the covenant was not void in toto,

but only in so far as it required the tenant to pay the income tax: *Howe* v. *Synge* (1). The present case, however, in my opinion, stands upon a different basis altogether. The lessor can charge any rent which the lessee is willing to give her; but out of that rent she must allow a deduction in respect of the income tax. So far as regards the rent of £22 reserved by the lease is concerned, the tenant's obligation is to pay that sum, less by the amount of the income tax. He is not bound to take advantage of the alternative provision reducing the rent to £14; but if he does take advantage of that provision he must comply with the terms upon which he is to get the reduction.

MOORE J.:—

In the present case the defendant FLYNN, the lessee for a term of 150 years, under a lease of 1st February, 1894, held certain lands in the County Cork on the redendum of a rent of £22, over and above all taxes, rates, charges, impositions whatever, quit rent and Crown rent excepted. This left the duty of paying all taxes and rates on the lessee, other than those payment of which was prohibited by Act of Parliament. This is the effect of *Gaskell* v. *King* (2).

Income tax, or, as it is better known in the earlier law, "property tax," is, as between the tenant and the public, an occupier's tax: *Cumming* v. *Bedborough* (3). But although the occupier being tenant of the lands is primarily chargeable with the duty "on paying such duties, he shall deduct so much in respect of the rent payable to the landlord," &c.: sect. 60, Act of 1842, incorporated into the Irish Act of 1853. The primary duty, therefore, of the tenant was to pay the income tax charged on these premises, including in the circumstances of this case what is called the landlord's income tax, and his primary right under the statute was to deduct the proper amount of such tax when paid from the next accruing rent.

Sect. 73 of the same Act of 1842, also now applicable to Ireland, proceeds to deal with the right of deduction: "No contract, covenant, or agreement between landlord and tenant or any other persons touching the payment of [income tax] on their respective premises shall be deemed . . . to extend to duties charged thereon under this Act . . . but all such duties shall be charged on occupiers, subject to such deductions and repayments as are by this Act authorized, and all such deductions and payments shall be made and allowed accordingly, notwithstanding such contracts, covenants, or agreements."

The right of deduction from the rent was further secured to the occupying tenant paying the tax by sect. 103, also now applicable to this country. This section imposes a penalty of £50 on any landlord who refuses to allow such a deduction; it goes on to provide "all contracts, covenants, and agreements made or entered into for payment of any . . . rent in full without allowing such deduction to be utterly void." I am of opinion, therefore, that the defendant on paying the property tax on the demised premises was entitled, if he so desired, to deduct the statutable amount from the next rent he paid to the plaintiff. But the difficulty in the present case only now begins. The lease contained a provision [reads provision], the effect of which

(1) 15 East, 440. (2) 11 East, 165. (3) 15 M. & W. 438.

K. B. Div. 1921.

WYCHERLY v. FLYNN.

Moore J.

is that if the defendant pays all taxes, rates, &c., including, I take it, those for which he may not be legally liable, the lessor will accept from him the annual rent of £14.

In my opinion, to obtain advantage of this provision for the reduced rent, which is entirely optional with the lessee, he must pay and satisfy all the taxes, charges, assessments, and impositions payable out of or in respect of the lands. "Pay and satisfy" is quite inconsistent with a subsequent right of deduction. If the right of deduction is afterwards asserted, so as to throw the burden ultimately on the landlord, it is in such case the landlord and not the tenant who has paid and satisfied the charge. As Gibson J. well pointed out in *Bradshaw* v. *M'Mullan* (1), the policy of the particular statute must be considered. I am of opinion, as I have already indicated, that the main object of the sections I have read was to secure to the occupier his right of deduction from the landlord of what he had already paid to the State; this, notwithstanding covenant or agreement, and all provisions aliter to be utterly void. But I am equally of opinion that once the occupier secured the benefit of the right of deduction under the statute, though in the shape not of actual deduction but of paying a reduced gross rent, it was never intended that he should have a second or a double deduction from the reduced rent. There is in the present case no agreement, contract, or covenant depriving the occupier of his right to make the statutable deduction from the original rent of £22; such would be "utterly void." A provision that if he chooses to forego his right, as I construe it, and in lieu thereof receive the benefit by paying a rent reduced by more than one-third, all being a matter for his own election, is not, in my opinion, a contract against his right of deduction, and not, therefore, void or illegal. I think we must have regard to the spirit of the contract, as Lord Sugden put it in suggesting the converse case of an increased rent in *Davies* v. *Fitton* (2); and, in my opinion, there is nothing to prevent the lessee from insisting, if he so desires, on paying all the taxes, charges, and impositions (without deductions), and paying the lesser rent. I will take it that the parties have agreed that on the facts of the present case the rent is to be at the rate of £14 per annum and not the £22. If this is so, I am of opinion that the defendant cannot deduct from the reduced rent of £7 for the half-year sums already paid by him for income tax, and that there should be a decree for the half-year's rent in favour of the plaintiff. The question submitted to us by the learned Judge should be answered in the affirmative.

H. J. M'C.

The defendant appealed (3).

Conner K.C. and *H. Moloney*, for the appellant:—

Nothing in any contract or agreement between landlord and tenant affects income tax: the Income Tax Act, 1842 (5 & 6 Vict., c. 35), sects. 73 and 103. Under sect. 40 of the Income Tax Act, 1853

(1) [1918] 2 I. R. 487.
(2) 2 Dr. & W., at p. 236.
(3) In the Court of Appeal in Southern Ireland, before O'CONNOR M.R., and RONAN and O'CONNOR L.JJ.

(16 & 17 Vict., c. 34), a tenant is entitled to deduct from the rent payable to his landlord any payments made by him in respect of income tax: Schedule A. Therefore, in this case the tenant is entitled to deduct income tax from the rent of £14. The provision in the lease should be construed as referring to such taxes as the tenant might lawfully covenant to pay: *Gaskell* v. *King* (1). They also cited: *Readshaw* v. *Balders* (2); *Lamb* v. *Brewster* (3); *Peck's Settlement* (4).

Rearden, for the respondent:—

There is only one covenant—viz., a covenant to pay a yearly rent of £22 over and above all taxes, rates, charges, and impositions, but the tenant has an option if he makes certain payments on behalf of the landlord to pay a reduced rent of £14. Income tax is clearly included in the provision in the lease relating to the rent of £14. There is nothing illegal in that provision: *Calbron* v. *Travers* (5); *Reardon* v. *O'Donnell* (6). The tenant had not performed the conditions which entitled him to the benefit of the reduced or substituted rent of £14.

Conner K.C., in reply:—

Although sect. 73 of the Income Tax Act, 1842, has been repealed, still it affects this lease. Rule 23 of the general rules applicable to all the schedules in the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), corresponds to sect. 103 of the Act of 1842. The corresponding provision to sect. 73 is Schedule A, No. 8, Rules 1 and 2. Schedule A, No. 8, Rules 1, 2, and 4, replace sect. 40 of the Income Tax Act, 1853.

O'CONNOR M.R.:— Dec. 19

In my opinion the judgment of the King's Bench Division is right. The lease reserves the full rent of £22 over and above all taxes, rates, charges, and impositions whatsoever (quit rent and Crown rent only excepted). It is admitted that the tenant on paying this rent would be entitled to deduct income tax. But there is a unilateral covenant by the lessor with the lessee that if the lessee pay all the rates and taxes (the terms used being as wide as to cover income tax) and indemnify the lessor therefrom, then the lessor shall accept £14 in lieu of the £22. The question is whether the payment of all the rates, taxes, etc., by the lessee is a sufficient performance of the condition to enable him to satisfy the rent of £22 by payment of £14, less income tax paid. My answer to this is that the condition is not performed, because there are two elements in it—one the payment of the taxes, and the other the indemnity of the lessor. The last is not accomplished if the tax is deducted.

If this were an action, and the parties pleaded, the plaintiff would sue for the rent as reserved—£22—and on the lessee's covenant to pay same. The defence would be an averment of the condition under which the rent was reducible to £14. To sustain that defence he should prove the two elements I have mentioned—the payment of the tax and

(1) 11 East, 165.
(2) 4 Taunt, 57.
(3) 4 Q. B. D. 607.
(4) [1921] 2 Ch. 237.
(5) 12 C. B. (N. S.) 181.
(6) 31 I. L. T. 165.

Appeal. (*S. I.*) 1921.

WYCHERLY *v.* FLYNN.

the indemnity of the plaintiff by the defendant. I do not see any illegality in the conditions. So far as the defendant is concerned it involves no contract. He does not contract at all. He is merely given the option of performing a condition. He may refuse to perform it.

I entirely concur in the judgment of the Chief Justice.

RONAN L.J. :—

The facts of this case are stated in the judgments in the King's Bench Division. The judgment of the Chief Justice deals with the case as governed by the Act of 1918, which repeals the former Acts. Moore J. deals with it as under the former Acts. The case was argued before us on the former Acts. The decisions are on these Acts. The Act of 1918 practically re-enacts the material provisions of the former Acts, with one exception—viz., the following part of sect. 73 of the Act of 1842:—"No contract, covenant, or agreement between landlord and tenant, or any other persons, touching the payment of taxes and assessments to be charged on their respective premises, shall be deemed or construed to extend to the duties charged thereon under this Act, nor to be binding, contrary to the content and meaning of this Act"—is not re-enacted, but the whole Act is repealed by sect. 238 and Schedule 7 of the Act of 1918, and the proviso to sect. 238 would appear not to apply to this part of sect. 73 of the Act of 1842. Notwithstanding this, I think the former provision must continue to regulate the effect and construction of the lease of 1894, and that the repeal does not operate retrospectively so as to alter the rights of parties under prior instruments. In *Quilter* v. *Mapleson* (1) Jessell M.R. says:—"The question whether an Act of Parliament is retrospective in its operation must be determined by the provisions of the Act itself, bearing in mind that a statute is not to be construed retrospectively unless it is clear that such was the intention of the Legislature." In *Hickson* v. *Darlow* (2) Fry J. says:—"It is a well-known principle of law on the construction of Acts of Parliament, and especially when the rights and liabilities of persons are altered thereby, that they are not to have a retrospective operation unless it is expressly so stated." In *Gardner* v. *Lucas* (3) Lord Blackburn says:—"Now, the general rule, not merely of England and Scotland, but I believe of every civilized nation, is expressed in the maxim, Nova constitutio futuris formam imponere debet non praeteritis—prima facie, any new law that is made affects future transactions, not past ones. Nevertheless, it is quite clear that the subject-matter of an Act might be such that, though there were not any express words to show it, it might be retrospective." His lordship gives statutes relating to procedure and evidence as instances of this, and proceeds thus:—"But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid—to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding—I think the prima facie construction of the Act is that it is not to be retrospective, and that it would require strong reasons to show that is not the case."

(1) 9 Q. B. D., at p. 674. (2) 23 Ch. D., at p. 45F. (3) 3 A. C., at p. 603.

On these authorities I think Moore J. was right in holding that this part of sect. 73 applies still to the prior lease. I am also disposed to think that even if it were held that the repeal was retrospective, the lease ought to be construed according to the law then in force. The question then arises: Is the provision as to the reduced rent a covenant within this part of sect. 73? The first question is: Is it a covenant between landlord and tenant? In his statement of this "provision" in the lease the Chief Justice omits the first words, viz., "and the said lessors . . . do hereby covenant with the said lessee" [Reads clause in lease down to "notwithstanding"], so that the whole clause is an express covenant between landlord and tenant.

Can there be any doubt that it is a covenant "touching the payment of taxes and assessments to be charged on their respective premises"? If it is, the covenant is "not to be construed to extend to the duties charged by this Act." The Chief Justice does not deal with this section, but Moore J. sets it out in his judgment. He then refers to the covenant in question, but, like the Chief Justice, he omits the opening words, and calls it "a provision." He then construes the words in the covenant "all taxes," &c., as extending to the income tax. I cannot find any expression of opinion as to whether "the provision" was a covenant within sect. 73. Moore J. must have held that it was not, as he specifically does what the statute said must not be done if it was. It is hard to conceive a wider word than "touching." It seems to me clear that this express covenant between landlord and tenant not only touches but relates to and deals with "the payment of taxes and assessments" as above. It is a single covenant; the only question is whether it is within this section. If I am right in this, it plainly disposes of the case. If we assume that I am wrong, and that Moore J. is right, that the covenant is to be read as extending to the income tax in respect of the premises, how does the matter stand? The case says "it was admitted that save in respect of landlord's income tax the defendant had complied with all the requirements of the provision." Why was the clause repealed as to the future? Because it was thought unnecessary; that the other provisions of the Act gave the same protection to the tenant.

The tax in this case is a tax on the owner of the lands under Schedule A. It is the same whether the lands are in his occupation or in the occupation of a tenant. If the latter, the rent does not affect either the amount or the liability for the tax. It depends simply on "the annual value" of the lands. This is ascertained in Ireland by the Government valuation. There is a separate tax under Schedule B imposed on the occupier. If the owner is in occupation, the two taxes are assessed on him and recovered directly from him by the tax collector, or by legal proceedings if he does not pay. If, however, a tenant is in occupation, the Crown has adopted another mode for collection. They make the tenant the collector of the tax imposed on the landlord. This is done in the following way:—Instead of assessing the tax on the landlord it is assessed on the tenant, just as the tax under Schedule B, and the tax collector recovers both from him, and both are made Crown debts payable by him. His position is peculiar. He can object to the assessment under Schedule B if he is a person exempt from income tax. If the tax under Schedule A was assessed

Appeal. (*S. I.*) 1921.

WYCHERLY *v.* FLYNN.

Ronan L.J.

on the owner, he could object on the same ground. But when the tax under Schedule A is assessed on the occupier he must pay it, although neither he nor the landlord is liable for it. He is simply a collector bound to pay it. But, further, he is a collector bound to pay another man's tax before he has collected it from him. He pays it to the State, and cannot get it back from the State.

What is the scope of the Act? The assessment on the tenant is pure machinery for collection. Prima facie the landlord ought to have paid his own tax. If the statute utilizes the tenant as collector, and even makes him pay the tax in advance, he ought to be in, no doubt, as good a position as if the landlord paid his own tax. The tax in this case is £1 16*s*. If the landlord had paid this, the tenant would have his £1 16*s*. in his pocket. The mode of collection, whether by assessment or deduction, does not affect the incidence of the tax. The substance of the transaction is what the law looks to in these matters. It is obvious that provisions for the relief of the tenant who is placed in this position in relation to another man's debt should be construed so as to give him the most complete protection possible. It is said generally that the only right or remedy he has is to deduct the amount from the next payment of rent. This right is given by sub-s. 1 of Schedule A1 next referred to, but a further and most important right is given by sub-s. 2.

Schedule A, No. 8, of the Income Tax Act, 1918, provides as follows:—1, "A tenant occupier of any lands . . . who pays the tax shall be entitled to deduct and retain in respect of the rent payable to the landlord for the time being an amount representing the rate or rates of tax . . . the said deduction to be made out of the first payment thereafter made on account of rent." 2, "A tenant who pays the tax shall be acquitted and discharged of so much money as is represented by the deduction as if that sum had been actually paid as rent."

By paying the tax to the tax collector he discharges his statutory debt. This is the only legal payment of the tax. The Legislature makes it equivalent to payment of that amount of rent to the landlord. Apply this to the claim in the lease. What is the condition precedent in the covenant? According to the judgment of the King's Bench Division the only one in question is, "If the tenant shall pay and satisfy all taxes." Assume this includes the income tax. How could he perform this otherwise than by paying it to the tax collector? What else should he have done? In my opinion the condition was fully performed by the payment. If this is so, what is the plaintiff's case here? That there is an implied contract not to deduct it, not to claim credit for this payment either under sub-s. 1 or sub-s. 2. That cannot be put higher than an express contract, and such a contract would be clearly void, and apparently illegal, under Rule 23 of the General Rules.

There is, however, another term of the conditions precedent not noticed by the Court below, viz., "And from payment of all such rates, taxes, &c. . . . will during the said term . . . keep indemnified the lessors, their executors, &c." This is in addition to the condition of payment of the tax by the tenant. But if the tenant has paid, the only liability of the landlord is to permit him to deduct, so that this is really an express covenant not to deduct.

If the plaintiff's contention is correct, all the stringent provisions of the Act for the protection of the man who is forced to act as collector of the tax imposed on another, could be got rid of by the simple device of first naming an impossible rent, and then providing that the tenant should not be allowed to deduct the tax from the real rent.

The broad principle of the Act is that the landlord must give the tenant credit for the tax out of any rent the tenant pays him. This ought not to be evaded by the device of a real and imaginary rent in a lease.

In *Bradshaw* v. *M'Mullan* (1) we thought that specific prohibition of a contract not to deduct did not apply to a contract to indemnify. The House of Lords held that it did, as in the circumstances it was in substance a contract not to deduct, and that any other construction would defeat the object of the Act. I think this applies a fortiori to the present case.

O'CONNOR L.J. :—

The lease in this case contains the following provision :—"And the said lessors shall accept the yearly rent or sum of £14 in lieu of the . . . yearly rent of £22, anything herein contained to the contrary in anywise notwithstanding." It will be noticed that this covenant on the part of the lessor to accept a reduced rent depends on the performance by the lessee of certain conditions, all of which are legal if one construction of the document be admitted, and all but one of which are legal if the alternative construction be admitted. If the word "taxes" be taken to include income tax, one of the conditions—namely, that the lessee will save harmless, and keep indemnified the lessors therefrom—is clearly illegal. I could understand the landlord's argument if there was only one condition upon which the reduction depended, and that an illegal condition. If so, the argument to accept a reduced rent would be nudum pactum. But, as I have pointed out, that is not so here, the other conditions being good, and some of them relieving the landlord from an obligation to which he would otherwise be subject. In cases of this kind, the illegal covenant or condition will be considered as of no binding effect, or the document will be construed as if the general words of the covenant or condition did not embrace the illegal covenant. *Gaskell* v. *King* (2) seems to me ample authority for this proposition, and accordingly I am of opinion that the appeal should be allowed.

Solicitors for the appellant : *J. Stanton & Sons.*
Solicitor for the respondent : *A. Julian.*

C. L.

(1) [1920] 2 I. R. 47, 412.

(2) 11 East, 165.

K. B. Div. 1921.
June 15, 16.
Appeal.
Nov. 1, 2.
High Court of Appeal.
Dec. 15, 16.
1922.
Jan. 16.

RICHARD W. COOPER *v.* THE GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD.

Insurance Policy—Exceptions—Loss of motor-car—Riot or civil commotion—Onus of proof—Inference of fact—Power of Court to draw inference—Balance of probabilities.

The plaintiff insured his motor-car with the defendant company. The policy contained an exception of "loss or damage occasioned through riot or civil commotion occurring within the land limits of Ireland." The car was stolen in circumstances, the details of which were not disputed, from which the inference might be drawn that it was taken by insurrectionists to be used in the course of the insurrectionary campaign, or by ordinary thieves.

Held (reversing the trial Judge, the Divisional Court of the King's Bench Division, and the Court of Appeal in Southern Ireland), that on the balance of probabilities the proper inference to be drawn from the facts was that the loss fell within the exception.

TRIAL OF ACTION.

This action was brought by the plaintiff to recover the sum of £250, loss sustained by him by the theft of a motor-car, his property, which loss the plaintiff alleged was covered by a policy of insurance effected by him with the defendants on the 7th May, 1920.

The material defence was that the indemnity given by the policy was subject to certain exceptions, viz., inter alia, "loss or damage occasioned through riot or civil commotion occurring within the land limits of Ireland"; and the defendants pleaded that the loss occurred at Ballinrea, Douglas, Co. Cork, and was occasioned through riot or civil commotion.

The action was tried by Moore J., without a jury, on the 6th May, 1921, and the following facts are taken from the learned Judge's report of the trial:—

The plaintiff deposed that he lived at Ballinrea, Douglas, Co. Cork. He bought a Ford motor-car in 1920, which he insured with the defendants by the policy in question. On the 28th October, 1920, he returned to his own home from Cork, and put the car in his garage, which was alongside the house, outside the back door in the yard. Between 7 and 8 o'clock that evening he heard what he thought was a motor-car. He went to the back door from the house into the yard, and opened it. A voice said, "Shut that door." He opened it again, when the same words were spoken; and the same thing happened a third time. He saw only an arm, with what might have been a revolver, or else a stick. Shortly after he saw the car moving off.

In cross-examination, plaintiff stated no alarm was given before he heard the noise of the car. He saw only the arm of the man. Somebody other than this man started the car, probably some one or more. Two other cars were taken near his place on the Monday. Douglas was between five and a half and six miles from Cork City.

For the defendants it was proved by the District Inspector of Police in charge of the district, which included Douglas, that in October, 1920, five cars were taken in his area, of which one was plaintiff's

car, and two others belonged to neighbours of plaintiff. Three cars were taken in Douglas for the whole period up to April. The number of motors taken, according to the police returns, from the 1st October to end of April in whole South City of Cork and Rural District was fourteen cars. [This evidence was objected to but received, subject to counsel's objection.] There was a state of guerilla warfare in parts of Cork County and in the City of Cork, but not in Douglas or the immediately surrounding district. The combatants largely availed themselves of motors in their attacks on police and military.

Moore J. held that he could not find on the facts that there was either riot or civil commotion on the plaintiff's premises at the time the car was taken; that the facts were consistent with simple armed robbery or burglary; and that there was no necessary inference that the defendants had discharged the burden of proof cast on them of bringing themselves within the exception. He accordingly gave judgment for the plaintiff, with costs.

The defendants applied to the King's Bench Division (1) that the judgment so entered for the plaintiff should be set aside, and that judgment should be entered for the defendants. By their order dated the 16th June, 1921, the King's Bench Division (Molony C.J., Pim and Gordon JJ.) refused the defendant's application.

Murphy K.C. and *James Murnaghan*, for the defendants.

Conner K.C. and *J. FitzGerald*, for the plaintiff.

The arguments and authorities discussed were the same as in the High Court of Appeal for Ireland (infra, p. 45).

MOLONY C.J.:—

On the 7th May, 1920, Captain Richard W. Cooper, of Ballinrea, Douglas, Co. Cork, insured his motor-car with the defendant company, and, under the policy, the company undertook that, during the period covered by the policy, they would, subject to the exceptions, special provisions, and conditions contained therein, or endorsed thereon, indemnify the insured against the loss of or damage to the plaintiff's motor-car, by whatever cause such loss or damage might be occasioned. The exceptions to which the policy is stated to be subject are four in number, but the only one which is material to the present case provides against liability on the part of the company for "loss or damage occasioned through riot or civil commotion within the land limits of Ireland."

The motor-car was in Captain Cooper's garage in Ballinrea, which is between five and six miles from the City of Cork, when on the 28th October, 1920, between the hours of 7 p.m. and 8 p.m., the plaintiff heard what he thought was a car. He states in his evidence that he "went to the back door (from house into yard). I opened it. A voice said, 'Shut the door.' I opened it again. The voice again said, 'Shut that door.' A third time this happened. All I saw was an arm; it held what might have been a revolver, or else a stick. Shortly after, I saw car moving off." As the plaintiff heard a car started at

(1) In the King's Bench Division, before MOLONY C.J., and PIM and GORDON JJ.

K. B. Div. 1921.

COOPER v. GENERAL ACCIDENT ASSUR. CORP.

Molony C.J.

the time when he saw a man's hand holding a revolver, or stick, we may infer that at least two persons were engaged in the theft.

The defendants have pleaded that they are protected from liability by reason of the exception to which I have referred, and that the loss which Captain Cooper undoubtedly sustained on the occasion by the disappearance of his car was loss or damage occasioned by riot or civil commotion. So far as the pleadings are concerned, that point is expressly pleaded in the defence, and evidence was given by Mr. Patrick Riordan, who is a District Inspector, R.I.C., stationed in Cork, and whose district included Douglas, that in October five cars in his area were taken; one of these was the plaintiff's car, and two were from neighbours of the plaintiff. He also says that one car was taken from outside the Imperial Hotel in Cork, where it was left in the street during a children's party; and further on that "there is a state of guerilla warfare in parts of Cork County and in the City of Cork," but that "this does not apply to Douglas or to five or six miles round." In answer to Mr. Conner later in his evidence he says there was at least one gang of motor thieves operating in Macroom, which, however, was not in his district. On this evidence the defendants claim that they have brought the case within the exception.

There has been a good deal of argument at the Bar as regards the onus of proof. I think the onus of proving that the loss was occasioned by civil commotion rests on the defendants; but even if that were not so, I should be inclined to hold that Mr. Justice Moore was right in the decision at which he ultimately arrived. As regards the onus of proof, this case cannot be distinguished from *Gorman* v. *The Hand-in-Hand Insurance Co.* (1). There the company agreed, subject to the conditions, that if the property were destroyed by fire they would make good any such loss or damage; but one of the conditions was that the policy did not cover loss or damage caused by the act of an incendiary. There is there a general acceptance of liability for damages, and then a particular exception as regards loss or damage caused in a particular way, just as in the present case there is a particular exception as regards loss by civil riot or commotion. In that case the learned Chief Baron says: "The third endorsed condition provides that the policy shall not cover, inter alia, loss or damage caused by the act of an incendiary; and reading this condition as we are bound to do, as part of the policy, the contract is that the defendants shall be liable for loss by fire, provided it be not the act of an incendiary. When, therefore, it is once shown that the loss resulted from fire, the plaintiff has established a prima facie case, and the onus is thrown upon the defendants to prove that the act which caused the fire was within the proviso. The defence is not in any sense a traverse of an allegation comprised within the general averments of the complaint; it is plea in confession and avoidance, and the proof of it is upon the defendants." That case has been considered in the case of *Hurst* v. *Evans* (2), where it was distinguished by Lush J. as not applicable to the facts and circumstances with which he was dealing. I am not concerned, in the present case, to decide whether the distinction is a sound one, but I may say in passing that I am inclined to doubt it.

(1) I.R. 11 C.L. 224.

(2) [1917] 1 K.B. 352.

In *Munro, Brice, & Co* v. *War Risks Association* (1) the question on whom the onus of proof rested was again considered by Bailhache J., and that learned Judge in five propositions makes what I conceive to be a correct statement of the law, and he adopted the principles enunciated by the Chief Baron in *Gorman* v. *Hand-in-Hand Insurance Co.* (2). The onus is, therefore, on the defendant of satisfying the Court that the loss we are dealing with in this case was occasioned by riot or civil commotion. Civil commotion has been defined by Lord Mansfield in these words: "I think a civil commotion is this—an insurrection of the people for general purposes, although it may not amount to a rebellion, where there is an usurped power. If you think it was such an insurrection of the people for the purpose of general mischief, though not amounting to a rebellion, but within the exceptions of the policy, you will find for the defendants." I cannot find that the case in which these words were used by Lord Mansfield is reported, but the definition will be found at page 167 of Bunyon on Fire Insurance, sixth edition, and it has been frequently quoted since the occasion on which it was uttered in connexion with the destruction by fire of the house of Langdale in the Lord George Gordon Riots in 1780.

Now, in the present case there is, and was at the time of this theft, a good deal of disturbance amounting to civil commotion, and even to actual rebellion, in the City and County of Cork. A number of motor thefts have occurred and will occur in Cork, as well as in every other county. The facts deposed to by the plaintiff in this case establish a theft, and I am assuming in favour of the defendants that the evidence establishes the existence of civil commotion in the City and County of Cork. But a connexion between civil commotion and the theft must be established, and established not by mere conjecture, but by inference from facts. In a case of a somewhat similar policy to the present one—*Winicofsky* v. *Army and Navy General Assurance Co.* (3)—Mr. Justice Bray had to consider a claim on an insurance policy against burglary. The burglary was committed during an air-raid, when people were thinking more of protecting their lives than their property. During air-raids the number of burglaries had increased, and the insurance company sought to escape liability on the ground that the loss was "a loss occasioned by hostilities, or loot, sack, or pillage in connexion therewith," the fact being that during an air-raid the insurer went to a shelter, and left his shop unattended. When he returned he found that the place had been broken into by burglars. Bray J. in his judgment says that "he could not agree that the burglary was a loss caused by hostilities, though, no doubt, the air-raid, which was an act of hostilities, produced a state of affairs which made things easier for the burglars." In the same way it is not established in this case that the theft was due to riot or civil commotion, although, no doubt, the state of the City and County of Cork made things easier for thieves, because, as we all know, in the present disturbed state of affairs property cannot receive the same protection from the police as it would have if the police were confined to their ordinary police duties. The onus of proof is, as I have said, on the defendants

(1) [1918] 2 K.B. 78. (2) I.R. 11 C.L. 224. (3) 35 T.L.R. 283.

K. B. Div. 1921.

COOPER v. GENERAL ACCIDENT ASSUR. CORP.

of bringing the case within the exception. They have failed to do so in this case. On the whole case I have come to the conclusion that Mr. Justice Moore was right in his decision.

PIM J. :—

I agree with my Lord's judgment. I would like to add a few words. In answer to questions put by me at the conclusion of his argument, Mr. Murnaghan abandoned the point as to the onus of proof; but he asked us to draw the same inference from the facts in favour of the insurance company as the Court of Appeal drew in the case of *Munro, Brice, & Co.* v. *Marten* (1) in favour of the plaintiff in that case. He says that the evidence before us is sufficient to enable us to draw the inference which the defendants ask us to draw, viz., that the loss was occasioned by riot or civil commotion. In the case of *Munro, Brice, & Co.* v. *Marten and Others* (1) the Court had before it this state of facts: 1, that the ship was a well-found sailing ship; 2, that there was no wreckage found; 3, that the weather charts of other ships showed that the weather was not such as would render it probable that the ship foundered owing to bad weather; and that the vessel had to pass through an area where German submarines were operating, and in which other vessels with a similar starting-point and a similar destination had been destroyed by torpedoes.

The Court having eliminated as untenable every explanation of the disaster other than the last, considered themselves able and, indeed, coerced to draw the inference that the ship had been sunk by submarines. Another Court might not have had the courage to take that view; but it cannot be said that it is a conclusion to which the Court was not entitled to come. In the present case we are asked to draw a similar inference from evidence of civil commotion in the County and City of Cork, and from the allegation that several motor-cars had been commandeered by hostile forces in the said county and city. It has even been submitted that the only possible explanation of the theft is that the car was taken by hostile forces. If we drew such an inference, it might be correct; but, in my view, we are certainly not coerced to such a conclusion, nor even entitled to draw it. Thieves fish in troubled waters, and it is obvious that this car may have been taken by thieves with a view to theft, and nothing more.

We cannot eliminate every explanation other than the one which suggests the act of a hostile force. Consequently, I think Mr. Murnaghan's contention must fail. If it fails, he is driven back to the argument concerning the onus of proof, on which point I am entirely in agreement with the judgment of my Lord.

GORDON J. :—

I also agree with what the Lord Chief Justice has said, and with the conclusion at which he has arrived.

The learned Judge who tried the case rests his decision on the ground that the onus of proving that the case came within the

(1) 36 T. L. R. 241.

exception lay on the defendants, and that on the facts he could not find that there was either riot or civil commotion on the plaintiff's premises at the time the car was stolen. The learned Judge says that he could not on the facts hold that the inference was a necessary one. I think Mr. Justice Moore might have gone further, and held that the loss was not due to riot or civil commotion. I think he had materials to arrive at that conclusion. I myself would have arrived at that conclusion on the facts. I think it was a case of theft—theft with violence if you like—but still a theft of the motor-car which came within the terms of the policy.

H. J. M'C.

Nov. 1, 2.

The defendants appealed to the Court of Appeal in Southern Ireland (1).

Murphy K.C. and *James Murnaghan*, for the appellants.

Conner K.C. and *J. FitzGerald*, for the respondent.

The arguments and authorities discussed were the same as those in the High Court of Appeal for Ireland (infra, p. 45).

Cur. adv. vult.

RONAN L.J.:—

We have heard this case fully, and my judgment can be shortly expressed. The facts are, I think, fully and accurately stated in the judgment of the Lord Chief Justice, and I shall not repeat them. We are all agreed on what appears to me to be the only question of law in the case—that once the loss was established the burden rested on the defendants of proving that that loss was caused by riot or civil commotion. I say "caused" deliberately, as, in my opinion, the word "occasioned" means precisely the same thing as "caused." It is used as meaning the same thing in Mr. Justice Bailhache's judgment in the case to which we were referred during the argument. The question in this case, therefore, resolves itself into this: Ought Mr. Justice Moore to have been affirmatively satisfied on the evidence before him that this was a loss occasioned by civil commotion? It is only one step on Mr. Murphy's way to establish that civil commotion existed in the neighbourhood; his difficulty arises in establishing the next step, that the loss was thereby occasioned, and, in my judgment, he has not done so. We have heard a great deal of argument as to the balance of probabilities. Now, I have read the judgment of the Lord Chief Baron in *Gorman's Case* (2), and from this and other decisions it is quite clear that unless there is a balance of probability in favour of a plaintiff asserting a proposition, it is the duty of the Judge to withdraw the case from the jury. The only effect of there being such a balance of probability in favour of the party asserting

(1) In the Court of Appeal in Southern Ireland, before RONAN and O'CONNOR L.JJ., and DODD J.

(2) I. R. 11 C. L. 224.

Appeal. (*S. I.*) 1921. COOPER *v.* GENERAL ACCIDENT ASSUR. CORP. Ronan L.J.

the proposition is that he is thereby entitled to have the question left to the jury; but it in no way decides how the jury ought to determine the question. What a Judge has to do in such a case as the present is to ascertain whether, taking the evidence before him as a whole, he is satisfied as to the fact. In this case we have the short note of the evidence, the effect of which is stated by the Lord Chief Justice. The evidence consists of statements of opinion by a police officer, statements of specific facts by him, facts not within his own knowledge, which, for the purpose of this judgment, I shall assume the Judge gave proper effect to, and the statements of the plaintiff himself. We have not a verbatim report of the evidence. We have not seen the witnesses or heard them. The Judge at the trial, no doubt, himself asked the witnesses questions. Matters must have arisen on which he satisfied himself as the case went on. He was in a much better position to judge of the weight of the evidence than we are. Accordingly, where a case is tried by a Judge, with or without a jury, and where the Court of Appeal has necessarily an imperfect record of it, we are slow to interfere with his findings of fact without clear grounds for so doing. The question here is purely one of fact, depending upon the weight of evidence and the weight of evidence alone. Four Judges have already arrived at the same conclusion of fact—Mr. Justice Moore and the three Judges of the appellate tribunal, who have concurred with his view. The House of Lords has repeatedly laid it down that when two separate Courts have agreed as to a question of fact, nothing but an overwhelming case would induce them to overrule that decision. In my opinion in this case the evidence shows only that the motor-car was stolen by two men who came there for that purpose ; and it was perfectly open for the Judge on the evidence before him, according to the weight he attached to it, to arrive at the conclusion he did. Having regard to the fact that the King's Bench Division unanimously came to the same conclusion, this Court should not interfere with their decision. I may add that although I have not dealt with the authorities cited by Mr. Conner, dealing with the principle of insurance law applicable to the case, I fully appreciate their force, and the argument which Mr. Conner has based upon them.

O'CONNOR L.J. :—

The first question involved in this case is one of law—namely, on whom did the burden of proof rest? I am of opinion that once the insured person proved the theft or loss the onus lay on the insurance company of proving that the theft or loss came within the exception in the policy.

The second question is also one of law—namely, as to the construction of the words "occasioned by civil commotion." Now that there was civil commotion existing in this district at the time is beyond controversy, and it was so found by the learned Judge. In my judgment, as a matter of law, if this car was taken by insurrectionists and as part of the insurrectionary campaign, the loss to the plaintiff would have been occasioned by civil commotion. That, however, does not carry the defendants the whole way, because the burden

of proof was on them, and when the case came before the learned Judge at the trial, who tried the case without a jury, he was not satisfied as a matter of fact that they had discharged the burden of proof resting on them. I confess that if I had been the Judge at the trial I would have drawn a different inference from the facts, and I am doubtful whether the learned Judge gave sufficient weight to the several matters which have been so ably pressed upon us by Mr. Murphy. I shall summarize them. First, there was the fact to which I have already adverted of the existence of civil commotion in the district, and the desire of the insurrectionists to obtain motor-cars for the purposes of the insurrection. Second, there was the time of the happening. It was at seven or eight o'clock of an October evening, an appropriate enough time for an insurrectionary gang carrying out their objects by force, but not one that would be chosen by ordinary motor thieves. Third, there was the occurrence in the district at about the same time of five motor thefts, two of which were from neighbours of the plaintiff. Fourth, there was the show of force on the occasion. Fifth, there was also the rarity of the crime of motor-stealing before these troubles arose. Speaking from my own experience in the Law Room of Dublin Castle during a period of four years, I never came across a single instance of this particular crime, though it may, no doubt, be said that once the forces of law and order are inoperative, thefts of every kind may occur more easily than before. The learned Judge at the trial, however, was not satisfied that the defendants had discharged the onus resting on them of proving that the loss was occasioned by civil commotion. The same conclusion was unanimously arrived at by the Judges in the King's Bench Division, including the Lord Chief Justice. My colleagues are of the same opinion, and I am not prepared to carry my opinion so far as to dissent from the judgment at which they have arrived.

DODD J., in assenting, said that he did not consider that there was any evidence on which the Judge at the trial could have arrived at a conclusion other than he did.

R. ST. J. C.

Dec. 15, 16.

The defendants appealed to the High Court of Appeal for Ireland. (1)

E. S. Murphy K.C. and *J. Murnaghan*, for the appellants:—

The plaintiff having given such evidence as to raise a suspicion that the loss fell within one of the exceptions in this policy, the onus lies upon him to show that it did not so fall: *Hurst* v. *Evans* (2). *Gorman* v. *Hand-in-Hand Insurance Co.* (3) merely decides that where the facts are neutral the defendant fails. In this case the onus of proof is not material, because the defendant has established such a balance of probabilities that he is entitled to succeed. The scope of the policy

(1) In the High Court of Appeal for Ireland, before SIR JOHN ROSS C., O'CONNOR M.R., and ANDREWS L.J.

(2) [1917] 1 K. B. 52. (3) I. R. 11 C. L. 224.

High Court of Appeal. 1921. COOPER v. GENERAL ACCIDENT ASSUR. CORP.

was not limited to insurance of the car on the plaintiff's premises, consequently it is not necessary to prove the existence of riot or civil commotion upon those premises, but only that the loss was due to civil commotion existing somewhere within the land limits of Ireland. This need not be proved affirmatively; it is sufficient for the defendant to show that having weighed the possibilities and probabilities in the scales, the balance is such that the inference must be drawn that the car was taken for insurrectionary purposes.

On appeal from a Judge without a jury, the Court, even where the decision turns on a question of fact, is re-hearing the case, and may reverse the finding of fact if, upon the evidence, it comes to the conclusion that that is the proper course (*Coghlan* v. *Cumberland* (1)); and where the findings of fact are undisputed, an appellate Court is freer still, and may decide for itself what is the proper inference to be drawn from those facts, though in doing so it may be necessary to differ from the original tribunal: *Montgomery* v. *Wallace-James* (2); *Monro, Brice, & Co.* v. *War Risks Association* (3); *Dominion Trust Co.* v. *New York Life Assurance Co.* (4).

Also cited: *Cooper* v. *Slade* (5); *Colonial S. T. Co.* v. *Massey* (6); "*The Gairlock*" (7); *Joy* v. *Phillips, Mills, & Co.* (8); *Abrath* v. *North-Eastern Railway Co.* (9); *S. S.* "*Serbino*" v. *Proctor and Another* (10); Wylie, R. S. C., p. 782; Or. 58, r. 4, p. 783.

Conner K.C. and *J. M. FitzGerald*, for the respondent:—

We do not question the power of the Court to draw its own inference from admitted facts, but the plaintiff's statement that this car was stolen by two men who came to the house for it is the only material evidence proved in the case. In insurance law it is the proximate cause alone that is considered. The proximate cause of the loss here was the taking away of the car by two men, one of whom was perhaps armed; in other words, the theft of the car, and what the purpose in taking it may have been, or what it may have been used for afterwards, are wholly immaterial: Broom's Legal Maxims, 8th ed., p. 179; *Walker* v. *London Insurance Co.* (11); *Lawrence* v. *Accident Insurance Co.* (12); *Winspeare* v. *Accident Insurance Co.* (13); *Britain S.S. Co.* v. *The King* (14).

The loss was not occasioned by civil commotion, for there was no civil commotion within five miles of the spot where the car was taken. Civil commotion is not the same as rebellion; it is from the very derivation of the word a disturbance actually going on—something greater than a riot, but less than a state of war—and this commotion must be brought into actual relation with the damage or loss; practically it must be on the plaintiff's premises: *London and Manchester Plate Glass Insurance Co.* v. *Heath* (15). The only evidence

(1) [1898] 1 Ch. 704.
(2) [1904] A. C. 73.
(3) [1918] 2 K. B. 78
(4) [1919] A. C. 254.
(5) 6 H. of L. Cas. 746.
(6) [1896] 1 Q. B. 38.
(7) [1899] 2 I. R. 1.
(8) [1916] 1 K. B. 849.
(9) 11 Q. B. D. 440.
(10) [1916] 1 A. C. 464.
(11) 22 L. R. Ir. 572.
(12) 7 Q. B. D. 216.
(13) 6 Q. B. D. 42.
(14) [1921] A. C. 107.
(15) [1913] 3 K. B. 411.

of commotion was that of the District Inspector, who stated there was guerilla warfare from time to time in parts of Cork, and Mr. Justice Moore's judicial knowledge of actual commotion in Cork City. That is not sufficient evidence from which the Court can affirmatively find that the loss was occasioned by civil commotion; for although this Court may draw this inference, it ought not to do so when the drawing of such an inference would involve the reversal of the findings of the trial Judge and the two Courts below, unless the findings of the other tribunals are clearly erroneous: *Owners of "P. Caland"* v. *Glamorgan S.S. Co.* (1); *S.S. "Mendip Range"* v. *Radcliffe* (2).

Murnaghan, in reply.

Cur. adv. vult.

1922. Jan. 16.

SIR JOHN ROSS C.:—

The plaintiff, Captain Richard Cooper, of Ballinrea, Douglas, Co. Cork, by a policy dated 7th May, 1920, insured his Ford motor-car with the defendant company. The policy indemnifies the insured against the loss of or damage to the car, by whatever cause such loss or damage may be occasioned.

The undertaking was subject to certain special provisions and exceptions. The third exception is:—Loss or damage occasioned through earthquake, invasion, foreign enemy, or military or usurped power. The fourth exception is:—Loss or damage occasioned through riot or civil commotion occurring within the land limits of Ireland.

On the 28th October, 1920, the car was in the plaintiff's garage attached to his house in Ballinrea, which is about five and a half miles distant from the City of Cork. Between 7 and 8 o'clock on that evening the plaintiff heard what he thought was the sound of a car. He went to the back door and opened it. Thereupon, he heard somebody commanding him to shut the door; he opened it again, and he was ordered to shut it as before. He opened it a third time, and the same thing happened. He saw a man's arm holding what might have been a revolver or a stick. Shortly after he saw his car moving off. These are the simple facts, which are not disputed. The car must have been taken for some purpose. Two theories are put forward. The plaintiff contends that it was an ordinary case of robbery, where the thief takes the car to sell it, or to keep it for his personal use. The defendants contend that the taking of the car must be considered in the light of the surrounding circumstances; that it is an incident in the working of an existing belligerent system, and that the purpose and intention of the takers are of the utmost importance. I cannot help thinking, with great respect to them all, that the attention of the learned Judges who have dealt with this case was too much occupied in considering the question of onus. A question of onus may be sometimes of immense importance, as, for instance, in an action for damages for malicious prosecution, where the plaintiff must produce evidence to satisfy the Judge that it is inconsistent with the existence of reasonable and probable cause before he can get to the jury at all. But in a

(1) [1893] A. C. 215. (2) [1921] A. C. 556.

High Court of Appeal. 1922. COOPER v. GENERAL ACCIDENT ASSUR. CORP. Sir J. Ross C.

case of this kind, where the facts are not in dispute, and where everything depends on the inferences to be drawn from the facts, there is little advantage in discussing the question of onus. The judicial mind derives a certain amount of comfort and satisfaction in arriving at a doubtful conclusion by throwing the onus argument into the scale. The truth is that the facts will support either of the two antagonistic conclusions. If to an equal degree, the question of onus is all-important, because if the facts are equally consistent with the two adverse conclusions, the party on whom the onus lies must fail.

The question here is one of a balance of probabilities, and the scale is to be turned by a correct conclusion founded on circumstantial evidence. "The question of onus of proof is not," says Bowen L.J. in *Abrath* v. *North-Eastern Railway Co.* (1), "a rule to enable the jury to decide on the value of conflicting evidence." If the proper inference from the evidence is what is asserted by the plaintiff, the plaintiff succeeds; if it is that contended for by the defendants, the onus, if it is on them, is satisfied, and the defendants succeed. What is the meaning of "loss or damage occasioned through civil commotion occurring within the limits of Ireland"? We need not trouble to go back to Lord Mansfield's definition. Nobody can deny that at the time of this occurrence there existed civil commotion within the limits of Ireland. Some call this commotion war, others guerilla warfare, others rebellion or insurrection, others use more condemnatory descriptions. We have nothing to do with the ethics of the movement, whether it is criminal or excusable. We find that it existed, that it was highly organized and was systematically worked against the then established Government of the land. It operated all over the country, and it is proved in this case to have been operating in the City of Cork.

Now, although the Ballinrea district is stated to be in a peaceable condition, we must not forget that in fifteen minutes' time after the car was taken it could arrive at the very centre of the civil commotion in Cork, and could be made use of for the purposes of those directing the civil commotion. But it is contended that distinct evidence must be given of connexion between the action of the takers of the car and those directing the civil commotion. Some of the Judges seem to think that there must be evidence that will coerce them into arriving as this conclusion. The trial Judge gives us to understand that nothing short of a necessary inference would have satisfied his mind. So strongly has the contention as to the onus impressed him that he requires something in the nature of an inference that will follow logically from precise premises. He indicates that he might have been influenced by a declaration on the part of those who took the car, that they were taking it for the purposes of the organization responsible for civil commotion in the City of Cork, or by a formal receipt, if they had given a receipt. If they had made such a declaration, or if they had given such a receipt, even that would not have been conclusive. The making of the declaration or the giving of such a receipt might be a device of an ordinary thief to overawe resistance. The same idea appears in the interesting judgment of Pim J., where he speaks of coercive evidence and of the elimination of every explanation other than an act of a hostile force. This language is suitable

(1) 11 Q. B. D., at p. 456.

to the degree of certainty required for the conviction of a criminal, and is wholly inapplicable to a case like this. If the takers had been recognized as connected with the civil commotion, even that could not have been made the basis of a necessary inference; they might, notwithstanding, have stolen the car for their private advantage. It has been contended here that even if the car had been found to have conveyed men who were attacking a military or police barrack, that would not have been sufficient.

The words of the exception must receive a reasonable construction. A reasonable construction seems to me to be, that if the car was taken by some persons for the purpose of being used in the civil commotion, or of assisting those who were furthering the civil commotion, that is sufficient to establish the exception. The District Inspector says that the combatants largely avail themselves of motors in their attacks on the police and military. In his area five cars were taken in the month of October. It is not suggested that these cars were taken by ordinary motor thieves. We know that expert motor thieves operate in London and in other large cities. But to dispose of a stolen car requires skill and careful planning. To anyone acquainted with the circumstances of Irish life, before the time of general disorder, the occurrence of such a crime would appear most improbable. The circumstances may have changed since the powers of the police have been diminished by the insurrectionary movement; but even in the present circumstances I find it hard to believe in the existence of gangs of ordinary motor thieves. Both sets of belligerents are known to be against ordinary robberies. However, all this is a matter of inference, depending on the balance of possibilities, or rather probabilities.

I am not at all captivated by the suggestion that thieves fish in troubled waters. From what we know of the conditions of the present conflict, I should think it extremely unlikely that ordinary thieves would select these areas as a field for their operations; they would find it very difficult to either keep or dispose of the plunder.

We now come to consider the order made by the Commander-in-Chief in Ireland on the 12th November, 1920, as the competent military authority, under the Restoration of Order Act. It recites a previous order made on 1st November, 1919, by which the keeping of a motor car without a permit from the competent military authority is prohibited throughout Ireland. The next recital is in these words:— "And whereas it appears that motor-cycles and motor-cars have been largely used by evil-disposed persons in the commission of murders and other criminal offences; and it has become necessary further to restrict the having, keeping, or using of motor cycles and motor cars." The order then goes on to restrict the authority of the permits to the period between 6 o'clock in the forenoon and 8 o'clock in the evening, and within a distance of twenty statute miles from the user's residence.

When we know that this irregular warfare was carried on by sudden concentration of large numbers of armed men on isolated barracks, we can well appreciate the value of such a motor-car as this for the purpose of carrying on hostilities. The facts speak for themselves. The car is to be taken from a military officer, who must be

High Court of Appeal.
1922.
COOPER v. GENERAL ACCIDENT ASSUR. CORP.
Sir J. Ross C.

presumed to be a man of ordinary courage and nerve. It is not taken in the dead of the night, when the occupants of the house would be asleep. It is taken between 7 and 8 o'clock, on an October evening, boldly and openly, and not at a time that would be chosen by thieves. It is taken with a show of force, accompanied by peremptory commands, suggesting that though only two men are actually engaged, further force is immediately available. It is taken at a place that is within fifteen minutes' drive of the very centre of the movement. Several other cars have been taken in that very month for the purposes of the insurrectionary campaign.

The rarity of the crime of motor-stealing before the period of disorder is another element to be considered. The way in which the matter was handled gives one the idea that the operators were disciplined men, and belonged to a body equipped with an intelligence department. They knew who were in the house, and how to get the car out. Some of these elements by themselves may seem to be of little importance, but all taken together lead one irresistibly to the conclusion that this was no ordinary theft, but the work of the organization that was operating through the country. I cannot believe that there is anybody in the district—though this is hardly an argument—who would not have treated the theory of ordinary theft with derision. The order of 12th November, 1920, shows that a motor-car was looked on by the military as a dangerous weapon, and its capture was an incident in the rebellion, insurrection, guerilla warfare, or civil commotion. It is said that to arrive at such a conclusion as I have indicated is mere conjecture or surmise. To distinguish between what is conjecture and legitimate inference is often a matter of extreme difficulty. Roughly speaking, the difference is this: the inference must be legitimately drawn from the established facts; conjecture arises from the working of the imagination on insufficient facts. Lord Shaw of Dunfermline in *Kerr* v. *Ayr S. S. Co.* (1), speaking of inference and conjecture, puts the matter thus: "The distinction is as broad as philosophy itself. It is that an inference rests upon premises of facts, and a conjecture does not. Now, when you come to the region of inference, no one has ever suggested that the inference should be in syllogistic form, so that all the points of its premises shall with apt and exact completeness justify the conclusion reached. Whenever you are in the position of saying that, that you are determining what a reasonable man would have done, ex concessis you admit that you are in a region in which from premises, more or less ample, a conclusion may be reached in one direction or another." To take an example. I refer to the case of *Joy* v. *Phillips, Mills, & Co., Ltd.* (2). This is a case under the Workmen's Compensation Act. The deceased workman, a stable boy in defendants' employment, was found in the stable in a dying condition, suffering from a kick behind the ear from one of their horses. There was no direct evidence as to how the accident happened. When the boy was found he was clutching a halter. At the time when the accident happened the boy had nothing to do with the halter, and nothing to do in the stable. The horse was a quiet horse. Evidence was admitted that the boy had previously been reprimanded about

(1) [1915] A. C., at p. 235. (2) [1916] 1 K.B. 849.

hitting the horses with a halter and teasing them. The County Court Judge held that the boy must have done something to the horse to make it kick out, and that at the time of the accident the boy's duties in the stable were over; and, accordingly, that the accident did not arise out of his employment. It was held by the Court of Appeal that there was sufficient evidence to support the County Court Judge's conclusion. This was a case of circumstantial evidence, where direct evidence was not fully available. The County Court Judge held that the boy was teasing the horse with the halter, and that in consequence the horse kicked out and killed him. This was founded on the evidence that the boy was mischievous, and that the horse was quiet. This theory may not have been correct. The boy may not have been teasing the horse. The horse may have been frightened by something—we do not know what. It was contended that the County Court Judge's conclusion was a mere conjecture, but the Court held that he had a right to arrive at the conclusion he did on an estimate of probabilities. There are many cases under Lord Campbell's Act and the Workmen's Compensation Act in which similar inferences have been drawn and held good as a basis for a decision. See *Proctor* v. *S. S. Serbino* (1).

Mr. Conner in his very able argument now boldly contends that to make good the defendants' contention that the damage was occasioned by civil commotion, there must have been an actual disturbance or tumult on the premises, and that otherwise the civil commotion was not the immediate cause of the loss of the car, though it may have been the remote cause. This argument does not appear to have been pressed in the Courts below. At all events, it is not discussed in any of the judgments. He contends that there is no necessity for a balance of probabilities; that if the car was taken by a person engaged in civil commotion for the furtherance of the purposes of the commotion, that makes no difference; it was not the direct cause of the loss. He insists that the proximate cause of the loss was the taking of the car by the two men, which amounted to a theft. If the car was proved to have been afterwards used by the insurrectionary body for attacks on the police or military, he contends it would make no difference. Even if the men who took it avowed that they required it for insurrectionary purposes, he says that would be irrelevant. The civil commotion may have been the cause that led to the theft of the car, but the Court, he insists, has no right to inquire into the causes of causes—the purpose is immaterial.

It cannot be disputed that in insurance cases you must only look to the proximate cause of the loss. A policy excludes death from fits; the insured in consequence of a fit falls across a railway and is killed by an engine, or falls into the water and is drowned. In both these cases the company is rightly held liable, because the fit is not the proximate cause of the death in either case.

The way in which the matter presents itself, to my mind, is this. Civil commotion may manifest itself in various ways—in homicide, in arson, in tumult, in kidnapping, in ambushes, in forcible capture of war material, and such like. Each of these things when it occurs is an incident or a constituent element in the civil commotion: it

(1) [1916] 1 A. C. 464.

High Court of Appeal. 1922.

COOPER v. GENERAL ACCIDENT ASSUR. CORP.

Sir J. Ross C.

goes to constitute the civil commotion that is manifesting itself in this form for the time being. It is not clear thinking to hold that the civil commotion is an entity by itself, and that these manifestations of its operation are something distinct from it. For the time being the particular manifestation constitutes a form of civil commotion itself.

It is a strong thing, no doubt, for the defendants to ask this Court to arrive at a conclusion different from that of seven learned and experienced Judges. If there were any dispute as to the credibility of the witnesses, if there were any doubt about any fact as distinguished from an inference to be drawn from proved facts, the finding of the Judge at the trial ought to outweigh the opinions of any appellate tribunal which has not had the witnesses before it. But in this case we have no reason for believing that every material fact was not set out in the Judge's report, and the sole question is as to the proper inference to be drawn from the facts. I cannot think that the House of Lords cases referred to by Ronan L.J. are really applicable to this case.

Lord Lindley says in *Montgomerie* v. *Wallace James* (1): "I entirely concur in thinking that there is no law or settled practice in the House to prevent it from differing even from two concurrent findings of fact, if on careful consideration of the evidence this House comes to the conclusion that the findings are wrong." Lord Halsbury, in the same case, p. 75, uses these words: "But where no question arises as to truthfulness, and where the question is as to the proper inference to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the Judges of the Appellate Court." These observations were approved and applied by Lord Dunedin in *Dominion Trust Co.* v. *New York Life Insurance Co.* (2). If the attention of Ronan L.J. had been called to these cases, the Court would have had the great advantage of his opinion on the proper inferences to be drawn from the facts. It is plain that if O'Connor L.J. had not been unduly affected by the weight of numbers, he would have drawn the inference that this was a loss occasioned by civil commotion.

While deeply conscious of our responsibility in overruling the decision of seven Judges of distinction, I cannot evade the duty of forming and expressing my own conclusion. I am of opinion that the damage was occasioned through civil commotion, and, therefore, that the judgment of the trial Judge should be set aside, that the order of the King's Bench Division should be reversed, that the order of the Southern Ireland Court of Appeal should be reversed, and judgment entered for the defendants with costs of all the proceedings.

O'CONNOR M.R.:—

I have had the advantage of reading the judgment which has just been read by the Lord Chancellor, and I do not think it necessary to deliver an independent judgment; suffice it to say that I concur both in the conclusion and the reasons he has given.

(1) [1904] A.C. 92. (2) [1919] A.C. 257.

ANDREWS L.J. :—

The defendants seek to set aside the verdict found and judgment given for the plaintiff at the trial of this action before Moore J., sitting without a jury, on the grounds that the same were against evidence and the weight of evidence, and that on the evidence the learned Judge should have directed himself that the loss of the plaintiff's motor-car came within the exceptions contained in the policy of insurance.

The arguments advanced on behalf of the plaintiff in support of his judgment may be briefly summarized under four heads. In the first place, it is alleged that the facts proved do not disclose the existence of any civil commotion on or in the immediate vicinity of the plaintiff's premises from which the motor-car was taken at the time of the occurrence, and that proof of the existence of such civil commotion is a necessary condition of the defendants' immunity from liability under the policy; secondly, that even if the existence of civil commotion within the true meaning of that term as used in the fourth exception in the policy was proved, there is no satisfactory evidence that the loss sustained was occasioned thereby; thirdly, that the onus of proving both these facts, and, accordingly, of bringing the case within the fourth exception, lay upon the defendants, and that they failed to discharge such onus; and, fourthly, that this Court should not interfere with the findings of fact in reference to these matters by the learned Judge at the trial, especially as such findings were subsequently unanimously affirmed by the King's Bench Division and the Court of Appeal for Southern Ireland. I shall deal with these submissions seriatim.

1. In support of his first proposition, Mr. Conner, for the plaintiff, boldly contends that even if the defendants had proved to demonstration that the motor-car was taken by rebels for insurrectionary purposes, they would fail to bring the case within the fourth exception, unless the existence of civil commotion at the time and place of the occurrence was also proved.

It is apparent from a perusal of the learned Judge's notes of the trial that if the existence of civil commotion on or in the immediate vicinity of the plaintiff's premises at the time of the occurrence is an essential condition of immunity from liability, the defendants must fail, as there is no such finding by the learned Judge, and, further, no facts were proved from which any such conclusion could have been arrived at. But, in my opinion, it is quite unnecessary for the defendants to prove the existence of such civil commotion at such time and place. To support such a view it is necessary not only to read into the fourth exception words which are not contained in it, but also to delete from it the words, "occurring within the land limits of Ireland," which immediately follow, and which qualify or define the civil commotion referred to in the exception. If the loss was directly occasioned through civil commotion, it is, in my opinion, wholly immaterial where or when such civil commotion occurred, provided it was within the land limits of Ireland.

2. Assuming then that proof of civil commotion at the time and place of the occurrence is unnecessary, is there any evidence or any

High Court of Appeal. 1922.

COOPER v. GENERAL ACCIDENT ASSUR. CORP.

Andrews L.J.

sufficient evidence of civil commotion occurring within the land limits of Ireland causing the loss?

The existence of civil commotion at the time of the occurrence in Cork City, which was only between five and a half and six miles distant, is found as a fact by Moore J., who had ample grounds for so finding upon the uncontradicted evidence of District Inspector Riordan, that a state of guerilla warfare existed in parts of Cork County and in the City of Cork. Is there, then, evidence directly connecting such civil commotion with the loss of the plaintiff's motor-car? It must at once be admitted that there is no coercive evidence upon this point; but there is, in my opinion, ample evidence from which such connexion not only might but should be inferred. All the essential features of the occurrence point to the commission of the theft for the purpose of procuring the car to assist the members of the Irish Republican Army or those who were associated with them in their endeavour to overpower those to whom was lawfully entrusted responsibility for the preservation or restoration of peace and the maintenance of law and order in the country. One must, of course, be careful in considering this question not to be unduly influenced by facts which are mere matters of common knowledge to those who have been living in the country during this period of turmoil and unrest. One's decision must be based on and determined by the evidence.

O'Connor L.J. conveniently summarizes in his judgment some fo the circumstances which would have influenced him, had he been the Judge at the trial, to draw the inference that the car was taken by insurrectionists:—the existence of civil commotion in the area of Cork, the desire of the insurrectionists to obtain motor-cars for their purposes, the hour of the occurrence, the number of similar thefts of motor-cars in the immediate district and also in the larger areas referred to in the evidence, the show of force on the occasion of the theft, and the rarity of the crime of motor-stealing before these troubles arose. To these might be added the fact that the plaintiff had his car in Cork City on the day of the occurrence, where it is quite possible that it may have been seen by some of those responsible for civil commotion in that area; and, further, that there is no evidence that any motor thieves, apart from the insurrectionists, were operating in this district; for Mr. Conner admits with characteristic fairness and candour that the Judge at the trial ruled out the evidence given by the District Inspector, both on cross-examination and re-examination, which was somewhat ambiguous on this point. The defendants' case is further strengthened by the particulars of claim sent on 3rd November by the plaintiff to the company, in which he alleged that "some men" (not merely one or two) entered his garage and took away his car, and that "one man was armed with a revolver." There is no suggestion in these particulars—which were furnished whilst the circumstances were fresh in the plaintiff's memory—that the revolver might have been a stick.

Added to all this evidence, we have the Order issued on 12th November, 1920—a fortnight after the occurrence—and made under the powers conferred by Regulation 9 A. A. of the Restoration

of Order in Ireland Regulations, in which it is recited that "motor-cycles and motor-cars have been largely used by evil-disposed persons in the commission of murders and other criminal offences." This Order, taken in conjunction with the facts to which I have already referred, impels me to the almost irresistible conclusion that the car was taken by insurrectionists for unlawful purposes connected with the widespread civil commotion which at that time existed throughout the country.

But Mr. Conner, for the plaintiff, argues that even if this be so, the Court cannot have regard to any such purposes; and he cited to us several authorities in support of the proposition that in insurance law one can only have regard to the proximate as distinguished from the remote cause. This proposition is too well settled to admit of question: *Winspear* v. *The Accident Insurance Co., Ltd.* (1); *Lawrence* v. *The Accident Insurance Co., Ltd.* (2); *Britain S.S. Co.* v. *King* (3). But, in my judgment, there is a slight confusion of thought in applying the principle underlying these decisions to the present case. There is no question here as to proximate or remote causes. It is a common case that the cause of the loss was theft. The purpose for which the car was taken may be, and in the present case is, an important element in determining the true character of the theft, which, in my opinion, was an incident in the civil commotion; and it seems to me that to deny to the defendants the right of showing that the purpose for which the car was stolen was an unlawful purpose connected with civil commotion, would in effect be to strike the fourth exception out of the policy. I cannot accede to this argument; and I, accordingly, hold that there is ample evidence that the loss of the plaintiff's car was occasioned through civil commotion.

3. Plaintiff's third contention, however, is that the onus of proving the facts to bring the case within the fourth exception lies upon the defendants, and that they have not discharged this onus, but, on the contrary, have left the case in such a state of doubt and uncertainty as to whether the taking of the car was the work of ordinary motor thieves or of insurrectionists, that he is entitled to a verdict.

I entirely agree with the contention that the onus lies upon the defendants of bringing the case within the fourth exception, once the plaintiff has proved, as he did, that the car was stolen. So far as this Court is concerned, we are bound by the case of *Gorman* v. *Hand-in-Hand Insurance Co.* (4), which is indistinguishable in principle from the present case, and which, in my opinion, was rightly decided. If it conflicts with the decision of Lush J. in *Hurst* v. *Evans* (5), I prefer the latter, as did Bailache J. in *Monro, Price, & Co.* v. *War Risks Association, Ltd., and Others* (6). But, holding as I do, that the onus is on the defendants, I am of opinion that in proving the facts, which they have done, and to which I have already made specific reference, the defendants have not left the case in what Hamilton L.J. called in *Fleet* v. *Johnston* (7) "a state of equilibrium," but, on the contrary,

(1) 6 Q. B. D. 42.
(2) 7 Q. B. D. 216.
(3) [1921] 1 A. C. 99.
(4) I. R. 11 C. L. 224.
(5) [1917] 1 K. B. 352.
(6) [1918] 2 K. B. 79.
(7) 29 T. L. R, 207.

High Court of Appeal. 1922. COOPER v. GENERAL ACCIDENT ASSUR. CORP. Andrews L.J.

have discharged this onus, and brought the case within the exception referred to.

The conclusion at which I have arrived is not based upon mere conjecture, but upon legitimate and natural inferences and deductions from facts proved. As Lord Shaw pointed out in *Kerr* v. *Ayr Steam Shipping Co., Ltd.* (1), "inference rests upon premises of fact, and a conjecture does not"; and although in the present case demonstration and certainty are unattainable, I agree with Roche J. when he says in *Compania Maritima of Barcelona* v. *Wishart* (2) that in such a case "the law allows and even demands that an inference should be drawn from such facts as point to a conclusion." The House of Lords acted upon precisely the same principle in the Workmen's Compensation case of *Owners of Swansea Vale* v. *Rice* (3), as did the Court of Appeal in *Joy* v. *Phillips, Mills, & Co., Ltd.* (4).

4. The only point which remains to be determined is whether in these circumstances we should give effect to our opinion, or should hold ourselves bound by the findings of the Judge at the trial, affirmed, as they are, by two other Courts. If the disputed findings were the findings of a jury, or if they were the findings of a Judge upon specific and definite but controverted matters of fact, this Court would not, in my opinion, be justified in interfering with those findings, especially as they met with the approval of five of the six Judges before whom the case subsequently came. But this case was tried by a Judge without a jury, and there is no controversy whatever as regards the truthfulness or accuracy of any of the witnesses, upon which the Judge at the trial would necessarily be better qualified to express an opinion, having seen and heard the witnesses, and observed their demeanour in the witness box.

The sole controversy here is as regards the proper inferences to be drawn from admitted facts; and to quote the words of Holmes L.J. in the *S.S. Gairloch* (5), in such a case the appellate tribunal is in as good a position for arriving at a correct conclusion as the Judge appealed from, and it would be an undue restriction of the functions of the former if it were to hold itself bound by what has been found by the latter. The weighty words of Lord Halsbury in *Montgomerie & Co.* v. *Wallace-James* (6), which were cited with approval by Lord Dunedin in the recent case of *Dominion Trust Co.* v. *New York Life Insurance Co.* (7), are to the same effect; and I may add that the right of an appellate Court to draw its own inferences of fact is fully recognized in the Rules of Court (Or. 58, r. 4), and was exercised by the Court of Appeal in *Munro's Case* (8), to which I have already referred. There, as here, the decision depended largely, if not entirely, upon what Bankes L.J. called "a weighing of probabilities," or "a balance of possibilities." See also *Coghlan* v. *Cumberland* (9).

But Mr. Conner carries his argument one step further, and relies upon the highest authority to show that when two Courts arrive at what are called "concurrent findings of fact," a higher Court should

(1) [1915] A.C. 217.
(2) 34 T. L. R., at p. 253.
(3) [1912] A. C. 238.
(4) [1916] 1 K. B. 849.
(5) [1899] 2 I. R., at p. 18.
(6) [1904] A. C. 73, 75.
(7) [1919] A.C., at pp. 257-8.
(8) 36 T. L. R. 241.
(9) [1898] 1 Ch. 704.

be very slow to interfere with such findings. He relies upon the words of Lord Herschell L.C. and Lord Watson in *Owners of the P. Caland and Freight* v. *Glamorgan S.S. Co., Ltd.* (1), and of Lord Atkinson in *Owners of S.S. Mendip Range* v. *Radcliffe* (2). If I were satisfied that in arriving at his decision Moore J. had acted upon the principle to which I have already made reference, and which I hold to be a sound one, of weighing the probabilities one with another, it would only be with much hesitation and diffidence that I would differ from him and give effect to my own opinion. But in my view the learned Judge acted upon an erroneous principle when, as appears by his report, he states that he could not, except by necessary inference, hold that the defendant company had discharged the burden of proof cast on them of bringing themselves within the exception, and that he could not on the facts say that such inference was a necessary one. In my opinion, this view of the defendants' duty placed an undue and unreasonable onus upon them, and amounted in law to a misdirection. The same misconception of the defendants' duty underlies, in my opinion, some of the judgments of the other learned Judges before whom this case has come, as, for example, that of Pim J., who considered that a verdict could not be found for the defendants unless they "eliminated every explanation other than the one which suggests the act of a hostile force."

Taking these matters into consideration, and bearing in mind that O'Connor L.J. states in the most express terms that had he been the Judge of first instance he would have drawn the inference that this was a loss occasioned by civil commotion, I feel that I am free to give expression and effect to the same view, and to hold that the defendants have brought the case to my satisfaction within the fourth exception to the policy, and that they are entitled to our judgment with costs.

Solicitor for the plaintiff: *T. H. Gardner Wallis.*
Solicitor for the defendants: *Laurence J. O'Neill.*

H. J. M'C.

(1) [1893] A. C. 207. (2) [1921] 1 A. C., at p. 576.

High Court of Appeal.
1922.

Jan. 18, 19.
Feb. 10.

LEYBURN, Applicant; ARMAGH COUNTY COUNCIL, Respondents, No. 2 (1).

Malicious injury—Organized robbery—Compensation—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5, *sub-s.* 1; *Malicious Injuries Act*, 1853 (16 & 17 *Vict. c.* 38)—*Jurisdiction of High Court of Appeal.*

The High Court of Appeal for Ireland established by the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), sect. 38, is not a substitution for the former Court of Appeal, but is a Court separate and distinct from the Courts existing at the passing of the Act, and with a more extensive jurisdiction than any appellate tribunal that has hitherto existed in Ireland, and consequently is not bound by their decisions.

A number of armed men entered a house and took away a gun, revolver, ammunition, and other articles. No chattels other than two hats were injured or damaged. The owner applied for compensation for the articles stolen as well as for damage to the hats.

Held, that the raid being of the character of an organized robbery, the applicant was not entitled to compensation under the Malicious Injuries Code for the loss of the goods stolen.

Kirby v. *Kerry Co. Council* ([1921] 2 I. R. 388) overruled.

Appeal by the Armagh County Council from an order of the Court of Appeal in Southern Ireland, dated November 9th, 1921, whereby a decree granting the applicant £1 for articles damaged, and £18 for chattels stolen, by way of compensation under the Malicious Injuries Code, was affirmed.

The case came before Moore J. at Armagh Summer Assizes, 1921, on appeal by the County Council from the decree made by the County Court Judge. The following facts were proved or admitted:—

The applicant, William Leyburn, was a farmer living near Tynan, in the County of Armagh, and was also a special constable.

The applicant, as such special constable, had in his house at Tynan aforesaid on the 13th day of May, 1921, certain arms and equipment, and had also equipment of two brothers of applicant who had served in the army.

On the said 13th May, 1921, the applicant was absent from his house. His sister, Annie Leyburn, who resides with applicant, was alone in the said house. A number of men, estimated to be about forty, approached said house, and three of them came to the door. The door was open, and the three men entered the house. One of them asked said Annie Leyburn if any men were in the house, and she said no. Said Annie Leyburn was then asked where the ammunition and arms were, and she replied that she did not know. The three men and others (about twelve in all) searched the house. Some were armed with revolvers, and some with rifles. A number of articles,

(1) Before Sir John Ross C., Molony C.J., Henry C.J., Andrews L.J., and Dodd J.

applicant's property, were stolen and carried away by the party of men who had entered, including a gun, revolver, ammunition, military equipment, and some other chattels. Two hats belonging to the applicant were in a box in said house. These two hats were taken out of said box by said party and trampled upon and destroyed. No damage was done to applicant's said house except the disorder occasioned by said searching, and no claim was made by the applicant in respect of any damage to or disorder in said house.

No chattels, other than said two hats, were injured or damaged.

The value of all the articles so taken away or damaged was admitted and agreed between the parties to be £19.

There was included in the said sum of £19 the value of said two hats destroyed as aforesaid, namely £1.

Davison, for the appellants :—

In order to recover compensation for malicious injury applicants must, as a rule, bring themselves within sect. 135 of the Grand Jury Act, 1836 (6 & 7 Wm. 4, c. 116). That section deals with malicious damage, injury to, or destruction of specified classes of property ; and it authorizes the allowance by way of compensation of such sum or sums of money as the person or persons "so injured ought to receive for such injury or damage." The provisions of that section have been extended by the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), to all classes of property, real or personal, provided the malicious act done was a crime punishable on indictment under the Malicious Damage Act, 1861. This case is not within either Act; and, to succeed, the applicant must rely on the Malicious Injuries Act, 1853 (16 & 17 Vict. c. 38). Compensation under this Act, sect. 1, can be awarded only where property is destroyed, demolished, damaged, or injured by an unlawful assembly. The compensation is given for "all damages which shall be so sustained . . . by means of any such unlawful acts or offences," that is to say, by the acts of persons unlawfully or riotously assembled together, who "maliciously destroy or demolish, or partly destroy or demolish, or otherwise damage or injure" any houses or buildings, or goods or chattels therein.

Larceny, pure and simple, cannot be the subject of compensation : *In re Keane* (1) ; *Kenmare* v. *Kerry County Council* (2) ; *Clarence Factory* v. *Corporation of Belfast* (3) ; *Moyle* v. *Meath County Council* (4) ; *Taggart* v. *Corporation of Belfast* (5). In *M'Dowell* v. *Corporation of Dublin* (6), Holmes L.J. says, at p. 556 :—"Legislation has not yet gone so far as to make the ratepayers answerable for the depredations of a thief." So far as the present case is concerned, there has been no change in the legislation relating to criminal injuries since 1903.

Until quite recently it was the established law that no compensation could be recovered for goods or articles stolen. *Noblett* v. *Leitrim County Council* (7) laid the foundation of an extraordinary develop-

(1) 27 I. L. T. R. 122.
(2) 34 I. L. T. R. 11.
(3) 34 I. L. T. R. 164.
(4) 4 N. I. J. 127.
(5) 51 I. L. T. R. 160.
(6) [1903] 2 I. R. 541.
(7) [1920] 2 I. R. 148.

High Court of Appeal. 1922. LEYBURN v. ARMAGH CO. COUNCIL.

ment of the Criminal Injuries Code. That case laid down the principle that compensation could be awarded, not only for actual malicious damage to property, but also for all loss or damage which was the natural and direct consequence of the wrong that had been done. In *Tyler* v. *Cork County Council* (1) it was laid down that compensation could be given for larceny; but the basis of the decision in that case was that the larceny was the natural and probable consequence of the malicious acts of rioters, who demolished a shop and flung into the street a quantity of the stock-in-trade, which was stolen. I submit that Sir James Campbell C.J. went too far in holding that consequential damages included compensation for "all loss and injury . . . which in fact occurred"; or, as he put it in *Noblett's Case* (2), "all loss or damage which is the natural and direct consequence of the injury inflicted." In any event this case can on the facts be distinguished from *Tyler's Case* (1). The larceny of the arms in this case was not the natural or direct consequence of the injury to the hats. The sole purpose of the raiders was to seize and take away the arms. In *Tyler's Case* (1) Molony C.J. states that the sole and dominating motive of the riotous mob was to injure property. Every word of his judgment is in my favour. *Tyler's Case* (1) was followed in *Congested Districts Board* v. *Mayo County Council* (3). *Kirby* v. *Kerry County Council* (4) not only adopted but extended the principle of *Tyler's Case* (1) by holding that goods stolen by persons who burglariously entered a shop were the subject of compensation. That was, I submit, an erroneous decision, and it ought to be overruled by this Court. If it is allowed to stand, the County Councils will be insurers against burglaries.

Serjeant Hanna and *C. Murphy*, for the applicant:—

This Court has no jurisdiction to overrule decisions of the Court of Appeal in Ireland existing at the passing of the Government of Ireland Act, 1920 (10 & 11 Geo. 5).

[MOLONY C.J.—Former decisions of the old Court of Appeal could have been overruled by assembling the full Court.]

It is a fundamental proposition that Courts cannot overrule themselves.

[SIR JOHN ROSS C.—We are all aware of numerous cases where the late Court of Appeal completely changed its views. This Court is not the successor of the former Court of Appeal. It has an independent existence.]

It is not the successor, but your jurisdiction is the jurisdiction of the old Court of Appeal; and your decisions should be on the lines laid down by that Court. If you think you have jurisdiction to overrule *Tyler's Case* (1), *Kirby's Case* (4), and other similar cases, apart from distinguishing them, that must affect my argument.

[SIR JOHN ROSS C.—*Kirby's Case* (4) is challenged by the appellant, and that is the reason I thought it necessary to assemble the full Court.]

(1) [1921] 2 I. R. 8.
(2) [1920] 2 I. R. 143, at p. 253.
(3) 55 I. L. T. R. 4.
(4) [1921] 2 I. R. 388.

The question is whether the profession can regard decisions of the former Court of Appeal as final. Your Lordships are, I submit, bound by the principles laid down by that Court.

[SIR JOHN ROSS C.—We will treat every decision of the former Court of Appeal with due respect, but in the same way as the House of Lords treats decisions of the English Court of Appeal. When we think former decisions are wrong, we claim the right to overrule them.]

On the question of the jurisdiction of Courts to overrule former decisions, I would refer you to *Beamish* v. *Beamish* (1), where the Lord Chancellor (Lord Campbell) said at pp. 338–9: "The rule of law which your Lordships laid down as the ground of your judgment, sitting judicially, as the last and supreme Court of Appeal for this Empire, must be taken for law till altered by an Act of Parliament agreed to by the Commons and the Crown." Courts inferior to the House of Lords are dealt with by Brett M.R. in "*The Vera Cruz*," No. 2 (2). The first point in that case was whether the Court of Appeal was bound by a previous decision, because in a similar case on appeal it was equally divided. Brett M.R. said: "This raises the question whether any Court is bound by a decision of its own, which decision was grounded on the fact that the members of the Court present were equally divided. It was the custom for each of the Courts in Westminster Hall to hold itself bound by a previous decision of itself or of a court of co-ordinate jurisdiction." In the words of sect. 38 of the Government of Ireland Act, 1920, this Court has "appellate jurisdiction throughout the whole of Ireland." That appellate jurisdiction is the same jurisdiction as was exercised by the old Court of Appeal.

[SIR JOHN ROSS—The jurisdiction of this Court is wider than that of any Court of Appeal that ever sat in Ireland before.]

If this Court has the right to overrule decisions of the former Court of Appeal, lawyers and litigants will not know where they stand.

The Malicious Injuries Acts must not be treated as an artificial code. The words of the Malicious Injuries Act, 1853, give a wider measure of damages than sect. 135 of the Grand Jury Act. It is stated in the preamble that compensation for "losses or damage sustained by persons" by means of riotous acts may be recovered. The larceny of the arms by the unlawful assembly in this case resulted in loss to the applicant, and on the authority of *Tyler's Case* (3) and *Kirby's Case* (4) he is entitled to compensation. A fair inference from the case of *Congested Districts Board* v. *Mayo County Council* (5) is that where in the course of a raid by an unlawful assembly goods are stolen the owner can recover compensation for the loss.

Davison, in reply:—

Unless damage is actually done to property by an unlawful assembly there is no "damage so sustained" within the meaning of sect. 1 of the Malicious Injuries Act, 1853.

(1) 9 H. L. C. 274.
(2) 9 Pro. 96.
(3) [1921] 2 I. R. 8.
(4) [1921] 2 I. R. 388.
(5) 55 I. L. T. R. 4.

High Court of Appeal. 1922.

LEYBURN v. ARMAGH CO. COUNCIL.

Feb. 10.

SIR JOHN ROSS C. :—

This case came before us on appeal from a decision of His Majesty's Court of Appeal in Southern Ireland. The applicant, William Leyburn, obtained a decree from the County Court Judge of Armagh on 28th June, 1921, for the sum of £19, for the wantonly and maliciously seizing and carrying away a gun and other chattels by a number of armed and disguised raiders. From this decree the County Council appealed; and the appeal was heard by Lord Justice Moore at the last July Assizes, who stated a case for the Court of Appeal. The applicant is a farmer and a special constable. As such special constable he had in his house at Tynan, Armagh, on 13th May, 1921, certain arms and equipment. On that day about forty men approached the house. The applicant, William Leyburn, was absent; his sister, Annie Leyburn, was alone in the house. About twelve men entered the house by the door, which was open. They were armed with revolvers and rifles. After searching the house they took away a gun, a revolver, ammunition, and military equipment and some other chattels. Two hats were taken out of a box and destroyed. No damage was done to the house except the disorder occasioned by the searching, in respect of which no claim has been made. No question arises about the hats; a sum of £1 represents their value; and it is agreed that a decree for that sum is to stand. I propose to deal with the case on the assumption that all we are concerned with is the damage caused by the seizure and abstraction of the weapons and equipment I have mentioned. The learned Judge found as a fact that there was an organized robbery.

It has been in the first place contended that this Court is bound by the decisions of the former Court of Appeal. I have stated in my judgment on the preliminary point (1) that this High Court of Appeal has a more extensive jurisdiction than any appellate tribunal that has hitherto existed in Ireland. It is not a substitution for any former appellate Court. It is the High Central Court which is necessary for the determination of the mutual rights and obligations of the component parts of the federal system contemplated by the Act of 1920. It is the supreme guardian of the Constitution and the pivot upon which all the Constitutional machinery was intended to turn. Under sects. 39 and 40 of the Act all the jurisdiction heretofore exercised by His Majesty's Court of Appeal in Ireland is transferred to the Courts of Appeal in Southern and Northern Ireland respectively; but there is no transfer of existing appellate jurisdiction to the High Court of Appeal.

I have in the decision of the preliminary point called attention to the marked difference between the Government of Ireland Act of 1920 and the Judicature Act of 1877, since the latter by sect. 23 specifically transfers the existing appellate jurisdictions to the new Court of Appeal in Ireland. The High Court of Appeal is therefore a Court separate and distinct from the Courts existing at the passing of the Act, and is, consequently, not bound by their decisions. I need hardly say that it is bound to consider with the utmost reverence and respect the decisions of these appellate Courts, which were invariably composed of Judges of the

(1) See ante, page 15.

very highest distinction. We are, therefore, of opinion that it is our duty to consider whether the decision in *Kirby* v. *Kerry County Council* (1), which governs this case, was rightly decided.

We must first consider the sections of the various Acts of Parliament. By sect. 135 of the Irish Grand Jury Act of 1836 (6 & 7 Wm. 4, c. 116), it is provided, subject to certain strict requirements being satisfied, that compensation should be awarded for malicious injuries to certain classes of property. Everything turns on sect. 1 of the Malicious Injuries (Ireland) Act, 1853. If there is an unlawful assembly, and if the persons engaged in that unlawful assembly unlawfully, wantonly, or maliciously destroy, demolish, or injure certain classes of property, all damages which shall be so sustained by any person by means of such unlawful acts may be recovered, and so forth. The Local Government Act of 1898 transfers the jurisdiction to the County Court, and at the same time enlarges the description of property in respect of which compensation may be awarded. The section I have quoted from the Act of 1853 begins by defining the state of affairs under which compensation is recoverable, namely, an unlawful or riotous assembly; if under these conditions property is injured by the persons taking part in such assembly, damages may be recovered by the owners of the property. The dominating words in the section are "unlawfully, wantonly, or maliciously destroy or demolish." When this has occurred the remedy is applicable. Injury to the property is one thing; the actual removal or abstraction of the property is another. In the latter case the property may not be injured at all; furthermore, it may be subsequently recovered by the owner. No doubt the owner is injured by the abstraction of his property, but the section does not provide for that; it only deals with the damage sustained by reason of the destruction or demolition of the property in the circumstances mentioned.

It is contended that we must give a liberal or a generous construction to the sections; but such a construction, liberal to the aggrieved person, may be most oppressive to the innocent ratepayers. The complete loss of the property by theft may be a far greater injury to the aggrieved person than the partial destruction of the property not taken. The question is, however, whether the section provides for this or otherwise. The malicious injury code is a most artificial code, and can only be utilized in cases coming within its terms. Until recent years it has always been strictly interpreted, and it has never been treated as putting the ratepayers in the position of insurers against all malicious injuries. Many hard and anomalous cases occur, where through no fault of the claimant it is impossible under the Act to afford redress, as, for instance, in the spiking of the meadow case—*Fell* v. *Co. Council of Cork* (2)—and many others, when the damage has occurred, but the aggrieved person has not been aware of it in time.

The strong observations of Holmes L.J. in *M'Dowell* v. *Corporation of Dublin* (3), that "legislation has not yet gone so far as to make the ratepayers answerable for the depredations of a thief," has never been challenged by the direct dissent of any Judge. The earlier Irish statutes had express remedies for larceny, and I cannot but infer that

(1) [1921] 2 I. R. 388. (2) 48 I. L. T. R. 206. (3) [1903] 2 I. R. 541.

High Court of Appeal. 1922.

LEYBURN v. ARMAGH CO. COUNCIL.

Sir J. Ross C.

larceny was intentionally left out of the Act of 1853. The reasons given for the decision in *Tyler* v. *Cork Co. Council* (1) have been severely criticized in the course of this argument, but we are not called on to disapprove of that decision. In that case the dominating motive was to injure property, and the larceny was held to be the natural and contemplated consequence of the malicious act. I do not desire now to express any opinion upon the decision or on the reasoning of the learned Judges upon which it rests.

The main contention of counsel for the respondent in the present case is that on the true construction of the section compensation may be recovered for all damages sustained in consequence of an unlawful or riotous assembly, even if no damage is done to property. I cannot agree with that contention. The unlawful or riotous assembly is not co-ordinate with the malicious destruction or demolition. It is a condition under which the Court is at liberty to award compensation for such destruction or demolition, but it is not to be construed as an injury itself. Otherwise the aggrieved person if assaulted in the course of the riotous assembly could recover damages for such personal wrongs. If this were sound, the later legislation for awarding compensation for personal injuries would have been unnecessary or differently framed.

In the case of *Kirby* v. *Kerry Co. Council* (2) damage was done to the shop and goods, and certain goods were stolen. The Lord Chief Justice was of opinion that compensation should not be given for the goods stolen in addition to that given for the damage done to the shop and the goods therein. I am of opinion that this view was correct, and that the decision of His Majesty's Court of Appeal was wrong. In the case of the *Congested Districts Board* v. *Mayo Co. Council* (3) I think damages were given on a wrong principle. They might properly have been given in respect of the injury to the wood by cutting down the trees. I think the decision erroneous in awarding compensation in respect of the value of the trees taken away. We think that the decision in *Tyler's Case* (1) has been carried too far.

I have treated this case throughout as a case of pure larceny, and I am of opinion that under the code no compensation can be awarded.

We therefore reverse the decision of the Court below, and dismiss the application, save as to the decree for £1 above mentioned.

MOLONY C.J.:—

I agree with the judgment of the Lord Chancellor. A number of armed men constituting an unlawful assembly enter the dwelling-house of the applicant, through an open door, and steal and carry away goods to the value of £18; and, in the course of their visit, they maliciously damage two hats. It is agreed that the applicant is entitled to a decree for £1 in respect of the hats under section 1 of the Malicious Injuries (Ireland) Act, 1853, although no sum would have been recoverable under sect. 135 of the Grand Jury (Ireland) Act, 1836, as amended by sect. 5, sub-s. 1, of the Local Government (Ireland) Act, 1898; the malicious act done to the hats not being a

(1) [1921] 2 I. R. 8. (2) [1921] 2 I. R. 388. (3, 55 I. L. T. R. 4.

crime punishable on indictment under the Malicious Damage Act, 1861, by reason of the damage not exceeding £5. It is, however, contended by the applicant that he is entitled to recover the £18 on the authority of *Kirby* v. *Kerry County Council* (1), while the respondent submits that neither sect. 135 of the Grand Jury Act nor sect. 1 of the Malicious Damage Act, 1853, extends to cases of pure theft, and that if *Kirby's Case* (1) has the effect contended for it is erroneous and ought to be overruled.

The first case in which the question whether stealing came within the purview of the Grand Jury Act of 1836 was discussed is *In re Elliott* (2), which came before the Court of Queen's Bench in 1845. In the course of the case Perrin J., referring to the statutes dealing with malicious injuries, said:—"Compensation has been awarded under these statutes for a malicious killing of sheep, if it appeared the malice was directed towards the person; but if the sheep were killed merely for the purpose of stealing the fat, &c., it has been held not to be within these statutes." The view that mere larceny could not be the subject of compensation was adopted in many subsequent cases, including *In re Keane* (3), by O'Brien C.J.; *Lord Kenmare* v. *Kerry County Council* (4), by Madden J.; *Moyle* v. *Meath County Council* (5), by Kenny J. But then came a series of cases where malicious damage was done for the purpose of committing larceny. In *Wilde* v. *Armagh County Council* (6) Gibson J. refused compensation when the applicant, a jeweller, had his window broken; but it appeared that the dominant motive of the person breaking the window was the larceny of watches; while in *Reis* v. *Corporation of Dublin* (7), a case precisely similar in its facts, Johnson J. held that as the person who did the damage to the window could have been indicted under the Malicious Damage Act, 1861, the case came within sect. 5 of the Local Government Act, 1898, and compensation could be awarded for the window. In *M'Dowell* v. *Corporation of Dublin* (8) these cases were considered, and the decision of Gibson J. was disapproved of. Samuel Goodbody broke a pane of glass in M'Dowell's window in the course of and for the purpose of committing a larceny of jewellery. M'Dowell claimed £50, which included the value of the jewellery stolen. The Recorder gave a decree for £6 6s. for the window, and his decision was upheld. The importance of this case lies in the statement of Holmes L.J., at p. 556, where he sums up the law in the following words:—"It is, perhaps, anomalous that the owners of the property can claim compensation for injury to the window and not for the loss of the jewellery. Legislation has not yet gone so far as to make the ratepayers answerable for the depredations of a thief, and this is something to be thankful for; but until the law is changed they must pay for the wilful destruction or injury to property, even when the object of the culprit is to commit a larceny."

Serjeant Hanna, however, without directly challenging the authority of *M'Dowell's Case* (8) and other cases to the same effect, contends that the present case comes within the provisions of sect. 1 of the Malicious

(1) [1921] 2 I. R. 388.
(2) 9 I. L. R. 100.
(3) 27 I. L. T. R. 122.
(4) 34 I. L. T. R. 11.
(5) 4 New I. J. 127.
(6) 2 New I. J. 169.
(7) 3 New I. J. 184.
(8) [1903] 2 I. R. 541.

High Court of Appeal. 1922.

LEYBURN v. ARMAGH CO. COUNCIL.

Molony C.J.

Injuries (Ireland) Act, 1853, and claims that that Act gives a wider measure of damage, and entitles him to recover compensation for acts of larceny committed by a tumultuous assembly. The section provides that where persons unlawfully, riotously, or tumultuously assembled together shall "unlawfully, wantonly, or maliciously destroy or demolish, or partially destroy or demolish, or otherwise damage or injure, any dwelling-house . . . goods, chattels, or property therein . . . all damages which shall be so sustained by any person or persons by means of any of such unlawful acts or offences as aforesaid shall and may be recovered." The effect of the section is that where there is (*a*) an unlawful assembly of three or more persons; (*b*) property of the kind mentioned, wholly or partially destroyed, or demolished or otherwise damaged or injured by such persons, the owner of the property is entitled to recover all damages which he sustained by reason of such disturbance or demolition. This includes consequential damages (*Noblett* v. *Leitrim Co. Council* (1)), but not vindictive or punitive damages (*Worthington* v. *Tipperary Co. Council* (2)).

In the present case, however, it cannot be contended that there was any connexion between the damage to the hats and the larceny of the weapons, or that one was in any way consequent on the other. The persons came for the purpose of getting the weapons, and in the pursuit of their main object they, no doubt, injured the hats; but just as in *M'Dowell's Case* (3) compensation was given for the window broken and not for the jewellery stolen, so here compensation can be given for the hats destroyed, but not for the property stolen. *Tyler's Case* (4) is, however, relied on as supporting the opposite view. There are some passages in the judgments which, in my opinion, went too far, but I am still of opinion that the decision can be supported on the facts of that particular case, and I adhere to what I said in my judgment.

In the *Congested Districts' Board* v. *Mayo County Council* (5) the Court of Appeal held that where persons unlawfully assembled and cut down the applicants' trees, which they removed on their carts, and that their primary object was to steal the timber, compensation could be given, not only for the demolition of the wood, but for the value of the trees removed. This decision was followed by the same Court in *Kirby* v. *Kerry County Council* (6), where persons burglariously entered a shop, stayed there a long time, tossed about a certain amount of the stock in making a selection, and having selected articles of considerable value, carried them away. In this state of facts the Court of Appeal held that the applicants were entitled to compensation in respect of the goods stolen, as well as for the damages to their premises and stock. These two cases seem to me to have the effect of making the ratepayers liable for every theft; and I am unable to understand how the words of sect. 1 of the Act of 1853 can be extended so far. The governing words of sect. 1 refer to destruction, demolition, damage or injury, and do not refer at all to stealing; and that Parliament knew well how to provide compensation for larceny will appear by comparing this section with sect. 1 of the Malicious

(1) [1920] 2 I. R. 143.
(2) [1920] 2 I. R. 233.
(3) [1903] 2 I. R. 541.
(4) [1921] 2 I. R. 8.
(5) 55 I. L. T. R. 4.
(6) [1921] 2 I. R. 388.

Injuries (Ireland) Act, 1848, and the provisions of the 23 & 24 Geo. 3 (Ireland), which it incorporates and amends.

In my opinion the decision of the Court of Appeal in the present case, following *Kirby's Case* (1), cannot be supported; and I therefore think the order appealed from must be discharged, and in lieu thereof that a decree be made for £1, with the statutory costs in the County Court and before the Judge of Assize; the respondents, the Armagh County Council, to pay the applicant's costs in the Court of Appeal for Southern Ireland and in this Court.

HENRY C.J.:—

In this case, which was heard by Lord Justice Moore at the Armagh Summer Assizes, a decree had been given for a sum of £19 in respect of a gun and some other chattels which had been seized and carried off by a party of disguised raiders. The learned Lord Justice found in the case he has stated that it was a case of organized robbery.

The first question raised by Serjeant Hanna, who appeared for the applicant, was that this Court was bound by certain decisions of His Majesty's Court of Appeal for Ireland given before the appointed day, and that it was not open to us to consider them.

The Court of Appeal in Ireland as existing before the appointed day was constituted under the provisions of the Supreme Court of Judicature Act, 1877, sect. 10, and was the final Court of Appeal sitting in this country, the House of Lords being the only tribunal to which an appeal lay from it. This Court had given two decisions which were relied on—one in a case of *Tyler* v. *Cork Co. Council* (2); the other in a case of *Kirby* v. *Kerry Co. Council* (1). The first of these was a decision of a Court of five Judges (Lord Justice O'Connor dissenting); the second was a decision of a Court of three Judges.

If the High Court of Appeal for Ireland, as constituted under the Government of Ireland Act, 1920, represented the Court of Appeal as existing under the Judicature Act, there would be considerable force in Serjeant Hanna's contention in respect of at least one of the decisions. But under the Act of 1920, sect. 38, the old Supreme Court of Judicature in Ireland ceased to exist, and two new ones were established, one for Southern and one for Northern Ireland; and to the appellate division of each was given all such jurisdiction in their respective areas as was formerly exercised by His Majesty's Court of Appeal in Ireland. Therefore, the Courts of Appeal for Northern and Southern Ireland (within their areas) had precisely the same jurisdiction as the former Court of Appeal in Ireland.

The Act of 1920, then, by sect. 42, provided to set up the High Court of Appeal for Ireland for the first time, and by sect. 43 gave an appeal to that Court from any decision of the Court of Appeal in Southern or Northern Ireland.

How could the decisions of a Court whose jurisdiction and powers are transferred to two Courts from whom an appeal is in turn given to the High Court of Appeal for Ireland bind that Court? I am, therefore, of opinion we are not bound by the decisions cited. For the reasons given by the Lord Chancellor of Ireland, I think it is not necessary to consider *Tyler* v. *Cork Co. Council* (2) in the present case; but dealing

(1) [1921] 2 I.R. 388. (2) [1921] 2 I.R. 8.

High Court of Appeal. 1922.

LEYBURN v. ARMAGH CO. COUNCIL.

Henry C.J.

with this case on the facts as found by the Lord Justice, I am of opinion that it does not come within sect. 1 of the Act of 1853 (16 & 17 Vict., c. 38.) The governing words in that section applicable to this case are "damage or injure," and it may be noticed that in the Malicious Injuries Act, 1848 (11 & 12 Vict., c. 69), dealing with corn and other specified articles, express provision is made for compensation in the case of larceny, and this Act is recited in the preamble to the Act of 1853, but no corresponding provision is made.

I fully concur in the judgment of the Lord Chancellor, and do not desire to add anything more to what he has said.

ANDREWS L.J.:—

The last two years have witnessed a remarkable development of our malicious injury statutory and case law; but I venture to say that no feature of this change has come as a greater surprise to the profession than that larceny simpliciter, at any rate when committed by several persons, is a legitimate subject for compensation by the ratepayers. Yet such, I hold, is the necessary effect of the decision of the late Court of Appeal in *Kirby's Case* (1), and of the Court of Appeal for Southern Ireland in the present case.

Prior to the period referred to, it had either been admitted on behalf of the applicant, or held by the Court in an unbroken chain of authorities, commencing with the dictum of Perrin J. in *In re Elliott* (2), that compensation is not payable under our Irish malicious injury code in respect of goods which are the subject of mere larceny. The only limitation which we find had been grafted upon this principle was that the co-existence of larceny with malicious damage to the same goods did not prevent compensation being recovered in respect of the loss sustained: *Clarence Factory* v. *Belfast County Borough* (3). Outstanding amongst the judicial opinions upon the subject, unchallenged, and it was thought unchallengeable, was the dictum of Holmes L.J. in *M'Dowell* v. *Corporation of Dublin* (4), that "legislation has not yet gone so far as to make the ratepayers answerable for the depredations of a thief." However, *Noblett's Case* (5) and *Worthington's Case* (6), in which the late Court of Appeal in Ireland determined the right of an applicant in a claim for malicious injury to recover not merely the value of the property damaged or destroyed, but also all such damage as is the natural and direct or immediate consequence of the malicious injury to such property, seems to have been regarded as a new starting-point; and it was by the application of this principle in *Tyler's Case* (7), *The Congested Districts Board Case* (8), *Kirby's Case* (1), and *M'Cutcheon's Case* (9) that decrees were made which included compensation for the value of goods looted or taken away at the time of or subsequent to the commission of malicious injury to property.

With the principle of the right to include as consequential damages the value of goods looted when their loss was directly occasioned by

(1) [1921] 2 I. R. 388.
(2) 9 I. L. R., at p. 102.
(3) 34 I. L. T. R. 164.
(4) [1903] 2 I. R., at p. 556.
(5) [1920] 2 I. R. 143.
(6) [1920] 2 I. R. 233.
(7) [1921] 2 I. R. 8.
(8) 55 I. L. T. R. 4.
(9) 55 I. L. T. R. 97.

and consequent upon the commission of malicious injury, I express my respectful agreement; but the manner in which this principle has sometimes been applied and sought to be extended by the same Court of Appeal in some of the cases referred to is, in my opinion, open to question. Thus, whilst the decision of the Court in *Tyler's Case* (1) may possibly be supported, having regard to the admitted facts, and to the findings of fact of the Judge of Assize, which, as Sir James Campbell C. points out, are binding on the Court of Appeal (p. 12), I agree with Mr. Davison, who contends that the inclusion, by Sir James Campbell C., in consequential damage, of all damage that is "the natural or direct consequence of the previous riot" (see p. 12) is an unreasonable extension of what the same learned Judge referred to in *Noblett's Case* (2) as "all loss or damage which is the natural and direct consequence of the injury inflicted."

The distinction to which I have just referred may be well illustrated by a consideration of the facts of *Kirby's Case* (3). A number of persons burglariously broke into and entered a shop, tossed about a certain quantity of stock in making their selection, and took away other articles. Molony C.J., who heard the case at Assizes, whilst compensating the applicant for damage to the shop and to the goods so tossed about, considered that the facts proved amounted, so far as the abstraction of the goods was concerned, to nothing more than the ordinary depredations of a body of thieves; and, acting upon the principle referred to in *M'Dowell* v. *Dublin Corporation* (4), refused compensation in respect of such stolen goods. The Court of Appeal, however, considered that the case was concluded by *Tyler's Case* (1) and the *Congested Districts Board* v. *Mayo Co. Council* (5), and included in the compensation the value of the stolen goods. The decision is not, in my opinion, a satisfactory one. The Co. Council were not represented on the hearing of the appeal, and no judgments appear to have been delivered by the Court further than I have mentioned. With the greatest respect for the learned Judges who decided the case, I am of opinion that in certain vital respects *Kirby's Case* (3) differed from and was not concluded by the two cases referred to. Thus, in *Tyler's Case* (1) the sole and dominating motive of the raiders was to injure property, whilst in both *Tyler's Case* (1) and the *Congested Districts Board's Case* (5) a wrongful and malicious act was, in the first instance, committed to the very articles which were stolen—the boots and the trees; and as the theft was or might reasonably be said to be the natural and direct consequence of the prior malicious act or injury to such articles, their value might reasonably be included in the consequential damages to which the applicant was entitled in respect of such malicious injury. On the other hand, in *Kirby's Case* (3), where the motive of the raiders was burglary, no injury whatever was done to the articles stolen; and it was only by the unreasonable extension to which I have referred of the principle of consequential damages which had been established in *Noblett's Case* (2) and *Worthington's Case* (6), so as to embrace in it all loss or damage naturally or directly resulting from the riot or unlawful assembly

(1) [1921] 2 I. R. 8.
(2) [1920] 2 I. R. 143.
(3) [1921] 2 I. R. 388.
(4) [1903] 2 I. R. 541.
(5) 55 I. L. T. R. 4.
(6) [1920] 2 I. R. 233.

High Court of Appeal. 1922.

LEYBURN v. ARMAGH Co. COUNCIL.

Andrews L.J.

as distinguished from that which naturally and directly flows from malicious injury to property, that the claim in respect of loss caused by theft was allowed.

I do not deem it necessary to deal at any length with sect. 1 of the Malicious Injuries (Ireland) Act, 1853, upon which Serjeant Hanna so strongly relies, as I respectfully concur in all that the Lord Chancellor has said in reference to it in the judgment which he has just read. A careful consideration of the terms of that section, and a comparison between it and the terms of such English statutes as the Statute of Winchester (13 Ed. 1, st. 2, c. 2) and 28 Ed. 3, c. 11, and of such Irish statutes as 10 & 11 Ch. 1, c. 13, and 1 Wm. 3, c. 21; 57 Geo. 3, c. 19, s. 38, and 11 & 12 Vict., c. 69, show clearly, in my opinion, that larceny simpliciter is not the subject of compensation, though when the loss by theft flows naturally and immediately or directly from damage or injury to property of the character mentioned in the section, the value of such property so stolen may be included as part of what is referred to in the section as "all damages which shall be so sustained." The foundation of the claim must, however, be, by the clear words of the section, destruction of or damage or injury to property, as distinguished from its loss.

Applying the principles which I have enunciated to the facts of the present case, in which a raid was made, as Moore L.J. holds, of the character of an organized robbery upon a private dwelling-house, no malicious injury or damage whatever being done other than of a trifling character to two hats value £1 (whilst other goods value £18 were stolen from the premises), I am of opinion that for such stolen goods the applicant has no redress against the County Council under the malicious injury code. On the facts proved no indictment would lie under these Acts for malicious damage or injury to the goods so stolen, and accordingly no compensation is, in my opinion, recoverable in respect of them.

For these reasons I concur in the judgment of the Court that the decree should be reduced from £19 to £1.

DODD J.:—

The applicant, William Leyburn, had obtained from the County Court Judge of Armagh a decree for the sum of £19, "for the wantonly and maliciously seizing and carrying away of a gun and other chattels, and for the wantonly and maliciously damaging of two hats by a large number of armed and disguised raiders."

The ground of the application was set out by a careful and experienced solicitor; and though it has been rightly conceded that if any amendment of what I may call the pleading can be made so as to sustain the claim, it should be made, the form adopted by Mr. Anderson is not without significance.

The Judge finds that a number of articles, applicant's property, were stolen by these raiders, including a gun, revolver, ammunition, military equipment, and some other chattels. Two hats were trampled upon and destroyed. "No damage was done to applicant's said house except the disorder occasioned by said searching; and no claim was made by the applicant in respect of any damage to or disorder in said

house." The value of the two hats was £1; the value of the articles taken away was £18. The learned Judge says:—"I was of the opinion that the evidence showed an organized robbery on a large scale." It is clear that upon that finding he would have given a decree for £1 only; but counsel for the applicant, he says, "said the decision of the Court of Appeal in the case of *Kirby* v. *Kerry County Council* (1) compelled me to give compensation for malicious damage, though no injury beyond the loss of the goods and the damage to the hats was proved." *Kirby's Case* (1) was governed by *Tyler's Case* (2), and that brings us back to *Tyler's Case* (2). The Court of Appeal held that the decision referred to did rule this case, and from that ruling this appeal is brought. It does not appear whether the facts in this case were opened to the Court, or whether it was assumed by the counsel engaged that the facts brought the case within that decision. We must assume, I think, that it was a considered opinion. We must consider therefore, 1, whether the facts do bring it within *Tyler's Case* (2) case; and, 2, if so, whether *Tyler's Case* (2) is good law.

There is a little confusion between "taking away" being included in the category "injury to goods," or being a consequence of injury to goods. We must consider it in both aspects. That the taking away of goods is not injury to the goods taken away would seem to be clear on the construction of the Act. But it is settled law.

We are entitled to rely on our own experience—so held by Palles C.B. in the *Ballymagauran Case* (3)—"the general opinion of the profession for the last fifty or sixty years." By Lord Justice Holmes in *M'Dowell's Case* (4): "Applications for compensation under the Criminal Injuries Acts arise on circuit, and few of them are reported, but we have all had some experience of them, and I have never in my own experience known," &c.

There are, however, more solid grounds than the individual experience of Judges. There are numerous cases in the reports where it has been acted upon as clear law. Mr. Justice Gibson in *Wilde* v. *Armagh County Council* (5) dismissed the claim because the motive was robbery. Mr. Justice Johnson in *Reis's Case* (6) held that "intent" was sufficient, so far as damage to goods was concerned. Malice was a wrongful act deliberately done. Gibson J. was overruled; Johnson J. was upheld. There would have been no need for argument or decision as to motive or intent if theft were malicious damage. Gibson J. was making a new departure. He found that "motive" was a predominant factor in the English cases. He was right in that; wrong in applying it to overrule settled law in Ireland; and so the full Court of Appeal held in *M'Dowell's Case* (4), which is on this point conclusive. It is not quite accurate to say that the point did not arise. The Civil Bill came before the Recorder, Sir F. Falkiner, who had a lengthened experience in this branch of the law. The applicant claimed "that one Samuel Goodbody broke a pane of plate glass in a window of his premises, and that he thereby sustained a loss of £50." The Recorder ruled out the loss of the jewellery; but, notwithstanding the decision of Gibson J. in *Wilde's Case* (5), gave a

(1) [1921] 2 I. R. 388.
(2) [1921] 2 I. R. 8.
(3) [1915] 2 I. R., at p. 97.
(4) [1903] 2 I. R. 541.
(5) 2 N. I. J. R. 169.
(6) 3 N. I. Jur. (N. S.) 184.

High Court of Appeal. 1922.

LEYBURN v. ARMAGH CO. COUNCIL.

Dodd J.

decree for £6 6*s*., the cost of the pane. Everybody acquiesced in that decision as to the jewellery, but the Corporation appealed against the decree for the pane of glass. A pane of glass was not within sect. 135 of the Grand Jury Act, but was within "any property" in the Local Government Act, 1898. The Corporation were reluctant to pay the insurers of plate glass windows, and instructed me to uphold strenuously Mr. Justice Gibson's decision in *Wilde's Case* (1). I did so—unsuccessfully. It was not suggested from first to last that stolen goods were within the Criminal Injury Acts. Had they been, there need have been no discussion. All the Judges held that intent was sufficient. The dictum of Holmes L.J. was more than an obiter. It is a declaration of the then existing law, in the presence of his eminent colleagues, and evidently with their concurrence.

It is not stated in so many words, but it has been suggested that Lord Justice Walker accepted larceny as a ground of damage. The Lord Justice's astute mind raised a doubt which he proceeded to solve. In the English administration of the criminal law an indictment for a misdemeanour could not have been sent up if the misdemeanour had merged in a felony. He solves it thus: "A prisoner could, I think, be prosecuted for the misdemeanour of breaking the glass, though he were also charged with the felony of stealing the jewellery, and it might form the subject of a separate charge under the Malicious Damage Act." The antecedent of "it" is the breaking of the glass, not the larceny. His reference to *Skillen's Case* (2), where the Chief Baron granted compensation for the malicious damage though there was a felony, shows what was in his mind. Nor does the matter rest solely on the experience of the profession, or on inference. There are several circuit decisions; that of Sir Peter O'Brien C.J. in *Keane's Case* (3) is noteworthy. Bailiff's horse and car driven away; car found damaged; horse never recovered. He directed the Grand Jury to exclude the value of the horse from compensation, the horse not being injured. That was a case upon the Act of 1853, the Judge having held that it was not within the 135th section of the Grand Jury Act, though it was within the Act of 1853. Harrison J. in *Naughton's Case* (4) gave damages for the loss of the sheep. "If the sheep had been stolen, as suggested, it is incredible that no trace of them should have been discovered at any fair or market in the neighbourhood, and no other reasonable solution of the problem remains but the malicious destruction of the sheep." He was a very careful lawyer, with a large experience on circuit, and he found that the sheep were "destroyed" under the Act of 1853. If "the taking away" of the sheep had of itself been damage to the sheep, or was a consequence of the damage, it would have been unnecessary for the Judge to analyse the evidence to find material on which he could ground a decision that the sheep had been destroyed.

Palles C.B. in *Skillen's Case* (2) decided that though larceny was the motive, the malicious damage could be claimed for, the burning of the goods having been done to conceal the crime. The learned Recorder of Cork similarly ruled in *O'Connell* v. *Corporation*

(1) 2 N. I. J. R. 169.
(2) 32 I. L. T. R. 32.
(3) 27 I. L. T. R. 122.
(4) 24 I. L. T. R. 112.

of Cork (1). In *Taggart* v. *Corporation of Belfast* (2) I held that "although goods stolen are not the subject of compensation for malicious injuries to property," yet where a building is damaged by taking out and carrying away joists and beams, and in the proper repair of the building it would be necessary to restore the property stolen, the applicant can recover. If then taking away was either included in "injury" or a consequence of it, the analysis of the evidence was superfluous. Upon the whole, then, I am of opinion that it was well settled law down to the decision in *Tyler's Case* (3) that "larceny" of goods was not included in "malicious injury to goods" as a ground of damage. It might be a cause of damage; and though I cannot find any case up to *Tyler's Case* (3) where the taking away was held to be a consequence of the injurious acts, I am not disposed to dispute the proposition as a proposition of law.

I do not desire to add to the judgment of the Lord Chancellor on the matters he has so fully dealt with. I desire with all respect to say that I should myself have wished for a considered statement in *Tyler's Case* (3) as to how the Court dealt with the then existing law in Ireland. Speaking for myself, I do not get much assistance from the English cases decided upon the Act of Geo. 1 (4) and the Act of Geo. 3 (5).

The right to compensation under those Acts was given upon a totally different basis from the right given in our code. The right given was "reparation in damages on account of rioters having pulled down, or begun to pull down the plaintiff's house." The Act of Geo. 1 made that a felony. That prevented the injured householder from suing at common law for the tort. He got, therefore, the right to recover such damages as but for the Act he could have recovered from the wrongdoer. He could by a suitable writ have recovered damages for trespass to goods, for detention of goods, for what was subsequently recoverable in an action on the case for conversion of goods. The felony caused the felon's property to be forfeited, and a plaintiff, even if he had been permitted to bring an action, could not have realized damages. The felon's property went into the King's purse, out of which he kept up his State and paid, amongst others, his Judges. But inasmuch as before the Act the injured person could not have sued for felonious taking of goods, he had no right to reparation under the Act; for that he was not indemnified by the Act. Further, the Courts accepted motive as a defence. It was there that Gibson J. found his "motive." The law was severe, and where the penalty was death matters of detail and pleading became important. In favorem vitae absence of motive was a defence. Even yet juries, and Judges too, are unwilling that a man should be hanged for constructive malice. One needs to walk warily on ground that is unfamiliar. The Courts then held the applicant to strict proof that the damage claimed was "damage on account of rioters having pulled down, or begun to pull down, the plaintiff's house." Lord Ellenborough rejected stolen goods as not within the mischief. But in a full Court presided over by Lord Kenyon in *Burrows* v. *Wright* (6) "all the Court thought that

(1) 2 N. I. J. R. 253.
(2) 51 I. L. T. R. 160.
(3) [1921] 2 I. R. 8.
(4) 1 Geo. 1, S. 2, c. 5, s. 6.
(5) 57 Geo. 3, c. 19, s. 38.
(6) 1 East, 615.

High Court of Appeal. 1922.

LEYBURN v. ARMAGH CO. COUNCIL.

Dodd J.

the flour which was compelled by the mob to be sold was not a damage which could be recovered," not being consequential on the act of demolition. The decision was not based upon the offence being a felony. The facts are not unlike those in *Tyler's Case* (1), but I do not think reliance should be placed on that decision. We are unfamiliar with the "atmosphere" of the tribunal, and the rules of pleading and procedure then prevailing; and as Lord Haldane has said, "there are few more fertile sources of fallacy than to seek in a previous decision for what is simply resemblance of circumstances, and to erect a previous decision into a governing precedent on this account."

The Act of Geo. 3 gave a right to reparation for the demolition or partial demolition of a house, "where in the course of demolition any fixtures thereto attached or any furniture, goods, or commodities whatever which shall be therein shall be destroyed, taken away, or damaged, the county or the hundred shall be liable to yield full compensation to the person injured and damnified by such destruction, taking away, or damage." The Act of 1853 in Ireland, following upon the lines of the Act of Geo. 3, expressly omits "taken away" after "destroyed" and before "damaged," and "taking away" after "destruction" and before "damage." Contrast the words in the Act of 1853—"If any persons in Ireland unlawfully or tumultuously assembled together shall hereafter unlawfully, wantonly, or maliciously destroy or demolish, or otherwise damage or injure, any dwelling-house, outhouse, warehouse, shop, or building, or any furniture, goods, chattels, or property therein," &c. The sole remedy given by that Act on the facts in this case is for "damage or injury to goods." If the Legislature had intended to include "taking away," they had a precedent in the Act of Geo. 3. The one Act follows the other so closely that it is a reasonable inference that the draftsman had the Act of Geo. 3 before him when drafting the Act of 1853. However that may be, and apart from that, if the Legislature had intended to include "taking away" or "larceny," they had precedents. These words are included in the Corn Act, 1848. Apart from express enactment, injury to goods does not include "taking away" of goods; larceny was, I think, deliberately omitted.

What I should have desired from the majority of the Court who decided *Tyler's Case* (1) was light upon the Irish decisions, and how they were to be dealt with in future. There is a comity to the dead. As I have shown, "taking away of goods" was not recognized as a ground of damages by any previous tribunal in Ireland.

But there is something more. It was never held by any Judge; and there is no reported decision to show that any Judge ever considered "theft" of goods a head of damage "consequent upon" the "malicious injury to goods." How did all the eminent Judges go astray for fifty years? *Tyler's Case* (1) was decided by a majority, and I am not called upon to challenge it, there being special facts in that case upon which the learned Judge might have found as he did. The Lord Chancellor upheld his finding, but was careful to guard his judgment upon this matter. I should be inclined to go with the dissenting Judge in his apt phrase, "To hold otherwise than he

(1) [1921] 2 I. R. 8. (2) [1921] 2 I. R. 8.

was holding is, in my opinion, to confound sequence with consequence." He had a whole host of predecessors of that opinion. I should, I think, have refrained from setting aside Mr. Justice Samuels's finding, there being some evidence on which he could so have found; and I have always understood that the finding of a Judge will be upheld, unless there was no evidence to support it, even though the reviewing Judges would have found differently. But the Court of Appeal seem in *Kirby's Case* (2) to have held that a Judge at the trial must rule that goods taken away are necessarily included in damage. Otherwise they could not have upset the Lord Chief Justice's finding in fact. And now in this case reaching the climax, it is held that a Judge of first instance is compelled to find that the theft was the necessary consequence of the damage to the hats (though there was no evidence of that), and that everything taken out of the house is to be subject to compensation.

It is said that the motive being to get the gun by force supplies the place of actual injury. But just as the absence of motive to injure, as distinct from intent to injure, cannot prevent the act from being malicious, so the motive to injure cannot create an injury. Once an injury, however trivial, to the hats has taken place, Mr. Murphy contends that the damages are at large, as in the case of another class of action, where, when the slightest loss of service is proved, the jury may give substantial damages for family suffering. That is a special departure for special reasons from the ordinary rule. In no sense here can the abstraction of the gun and other articles be traceable to any damages to the hats. The theft of the articles seems to have been not even a sequence. Apparently it preceded the damage to the hats.

Each case must be decided upon its own facts. But the damage must follow as a reasonable result of the injury to goods. In the case before us, there is no injury to goods, no destruction, no damage consequent therefrom. I am of opinion that this case is not within the decision in *Tyler's Case* (1).

In overruling the decision in the Court below, we are in fact affirming the decision Moore J. would have given if he had not been "compelled" to go wrong.

Solicitor for the appellants: *Henry J. Harris.*
Solicitors for the respondent: *Moore & Anderson.*

C. L.

(1) [1921] 2 I. R. 388.

Appeal. (*S. I.*) 1921.

Nov. 3, 4, 7.

THE KING (CORPORATION OF LIMERICK) *v.* COMERTON AND OTHERS, AND THE LOCAL GOVERNMENT BOARD FOR IRELAND (1).

Local Government—Pensionable officer—Resignation or dismissal—Right to allowance — Dispute — Sealed orders of Local Government Board — Certiorari — Jurisdiction of Local Government Board—Local Government (Ireland) Act, 1919 (9 & 10 *Geo.* 5, c. 19), *sect.* 8.

Decisions given by the Local Government Board for Ireland within their jurisdiction are final and without appeal, and no Court can set them aside on the ground that they are wrong either in matters of fact or matters of law.

A Court will not set aside a valid legal order merely because the person who has obtained it may be unable to make use of it.

APPEAL by the Local Government Board for Ireland from an order of the King's Bench Division dated June 30th, 1921, whereby a writ of certiorari was directed to be issued against the Board at the suit of the prosecutors to remove into the King's Bench for the purpose of being quashed three sealed orders made by the Board on January 26th, 1920, under sect. 8 of the Local Government (Ireland) Act, 1919 (9 & 10 Geo. 5, c. 19).

The facts of the case (2) were as follows :—

The County Council of Limerick, as the local authority, appointed a Technical Education Committee, and the committee established a technical school in the City of Limerick, which, for several years, was conducted with very great success. In the year 1917 a Mr. de Lacey was appointed headmaster of the Limerick School of Commerce, which was part of the Technical Committee's undertaking; but the Department of Agriculture and Technical Instruction refused to sanction his appointment, or to recognize the regularity of any payments made to him.

The dispute having lasted some time, the committee, on the 30th September, 1918, decided to close the schools, and notice was served upon the members of the staff to terminate their engagements. The members of the staff all accepted a month's notice of dismissal, on the understanding, however, that steps should be taken to find a way out of the impasse; and that if the schools could be continued the notices of dismissal should be regarded as withdrawn.

Mr. Comerton did not, however, assent to any such agreement; and he was accordingly served with a notice to terminate his engagement on the 31st July, 1919, which gave him eight and a half months'

(1) Before RONAN and O'CONNOR L JJ., and DODD J.

(2) This statement of the facts is taken from the judgment of MOLONY C.J. in the King's Bench Division.

notice. Arrangements were subsequently made by the committee by which Mr. de Lacey's salary was not paid out of corporate funds; and the committee then sent to the Department a revised financial scheme for 1919, omitting the name of Mr. de Lacey, which scheme was approved of and accepted by the Department, the result being that the institute was reopened, and the notices to the staff, other than Mr. Comerton, were deemed to have been withdrawn.

I have carefully read through the minutes, and I am satisfied that there is no evidence that Mr. Comerton's notice of dismissal was ever withdrawn; and, in my opinion, his notice of dismissal became operative on the 31st July, 1919; and he is to be regarded as having been removed from his office upon that date. This view of the case was accepted by Mr. Comerton's solicitor, Mr. O'Donnell, as appears from his letter to the secretary of the committee of September 5th, 1919, and by Mr. Comerton himself, as appears from his letter to the Town Clerk of the 23rd September, 1919.

On the 3rd June, 1919, the Local Government (Ireland) Act, 1919, was passed, and Mr. Comerton claimed to come within the provisions of that Act as an officer of a local authority who had been removed from his office for some cause other than misconduct or incapacity, and therefore entitled to a superannuation allowance. The Local Government Board, however, thought it necessary for Mr. Comerton to resign his office before they proceeded to consider his claim, and accordingly Mr. Comerton, on the 17th November, 1919, obtained the sanction of the Department to this course; and on 22nd November, 1919, sent in his formal resignation to the Limerick Corporation. The Local Government Board then considered the matter, and made an order dated 26th January, 1920, by which, having recited that Mr. Comerton had resigned his office with the sanction of the Department, and that the salary, fees, and emoluments of which he was in receipt at the time of his resignation amounted to £467, they, in exercise of the powers given to them by sect. 8 of the Local Government (Ireland) Act, 1919, determined that he was entitled to receive an allowance from the local authority from the time of his resignation, and that the amount of his allowance should be £311 6*s.* 8*d.* per annum, payable in equal monthly payments on the 23rd day of each month.

The Local Government Board made similar orders in respect of some ten other persons, including Mary Halpin, who was a charwoman, and who got an annual allowance of £46 16*s.*, and Patrick T. White, one of the teachers, who was granted a gratuity of £993 12*s.* 1*d.*

The Corporation of Limerick applied to the King's Bench Division for a writ of certiorari to quash the three orders in question on the grounds that they were made without and in excess of jurisdiction, and that James Comerton, Mary Halpin, and Patrick T. White had ceased to hold their respective offices before their alleged resignations had been sanctioned by the Department of Agriculture and Technical Instruction for Ireland; and as regards Mary Halpin, on the further ground that she was not a whole-time officer.

The King's Bench Division, Molony C.J. and Pim J. (Samuels J. dissenting), held that the orders of the Local Government Board were ultra vires, and ought to be quashed.

K. B. Div. 1921.

R. (Limerick Corp.) *v.* L. G. B.

June 30.

The following judgments were delivered in the King's Bench Division:—

Samuels J.:—

The primary question for decision in this case is whether the Local Government Board had jurisdiction to make any determination in the matter.

Their jurisdiction depends upon the position of Mr. Comerton upon the 3rd of June, 1919. If he was a whole-time officer of a committee of a local authority within sect. 8, sub-s. 3, of the Local Government (Ireland) Act, 1919 (9 & 10 Geo. 5, c. 19), upon the 3rd June, 1919, the date of the passing of that Act, then the Local Government Board had jurisdiction to inquire into the case and make a determination when the dispute between him and the committee of the local body, the Limerick Corporation, arose in relation to the claim made by him under sect. 8, sub-s. 1, to have the amount of the allowance he would be entitled to determined, on the ground that he was removed from his office for some cause other than misconduct or incapacity, or upon his resignation with the sanction of the Department of Agriculture and Technical Instruction.

In my opinion Mr. Comerton was a whole-time officer of a committee of a local body within sect. 8, sub-s. 3, on the 3rd June, 1919.

By the Technical Instruction Act, 1889 (52 & 53 Vict. c. 76), sect. 1, sub-s. 1, a local authority may from time to time out of the local rate supply or aid the supply of technical instruction. Sub-clause 9 provides that the amount of the local rate to be levied in any one year by the local authority for the purposes of the Act shall not exceed one penny in the pound. By sect. 1, sub-s. 2, a local authority may, for the purposes of the Act, appoint a committee consisting either wholly or partly of members of the local authority, and delegate to any such committee any powers exercisable by the authority under the Act, except the power of raising a rate or borrowing money.

By sect. 3 the conditions on which Parliamentary grants might be made in aid of technical instruction should be those contained in the minutes of the Department of Science and Art for the time being. The administration of these Parliamentary grants was by the Agriculture and Technical Instruction (Ireland) Act, 1899 (62 & 63 Vict. c. 50), sect. 2, sub-s. 1, transferred to the Department of Agriculture and Technical Instruction.

In the case of Ireland, "local authority" was defined to be the urban or rural sanitary authority, as the case might be, within the meaning of the Public Health (Ireland) Act, 1878. The County Borough Council of Limerick is such a local authority. By sect. 7, sub-s. 2, the local rate for the purposes of the Act shall in the case of an urban sanitary authority be the fund applicable to the expenses incurred by such authority in the execution of the Public Health (Ireland) Act, 1878. The powers given to urban sanitary authorities by this Act were extended to councils of counties and other rural authorities by the Local Government (Ireland) Act, 1898.

By the Agriculture and Technical Instruction (Ireland) Act, 1899, sect. 14, sub-s. 1, the Council of any county or of any urban district may

appoint a committee for the purposes of technical instruction consisting partly of members of their own body and partly of other persons.

By sect. 15 large sums representing public moneys were placed at the disposal of the Department for the purposes, amongst others, of technical instruction. By sect. 16, sub-s. 1 (*c*), the sum of £55,000 per annum out of the moneys placed at the disposal of the Department shall be divided into such portions as shall be determined by the Department, with the concurrence of the Board of Technical Instruction; and of these portions one shall be distributed in proportion to their respective populations between the county boroughs, and shall be applied by the respective councils of these boroughs in aid of schemes approved by the Department for the purpose of technical instruction. Limerick being a county borough shared in this grant.

By sub-s. 5 money to be applied by the Department shall be applied subject to any conditions which the Department may require. By sect. 19, sub-s. 3, the Council of any urban district may, in addition to any existing power, raise in any one financial year a sum equal to one penny in the pound, and apply the same for technical instruction; and by sub-s. 4 (*a*) no money shall be applied under that section save (*a*) in accordance with a scheme approved by the Department, or sub-s. 5, for defraying administrative or incidental expenses incurred with the approval of the Department for the purposes of the Act. The statutory limits thus imposed on the Corporation confine their power of raising money by rates for technical instruction to twopence in the pound on the rateable valuation as the maximum; and all moneys so raised are to be applied according to a scheme approved of by the Department as a condition for their sharing in the grants of public money administered through the Department. The Corporation of Limerick carried on through a local committee, consisting partly of members of the Corporation and partly of other persons, for many years a very successful system of technical instruction under schemes sanctioned by the Department. It appears from the financial statement for the year ending 31st July, 1919, that the income of the Technical Instruction Committee was £3,224, £2,921 of which represented public moneys paid to the Corporation by the Department, and £303 represented the rate struck by the Corporation for technical instruction.

In 1917 a Mr. de Lacey was appointed headmaster of the School of Commerce, which was part of a system of education approved of by the Department, but the Department refused to approve of Mr. de Lacey's appointment or to sanction any scheme in which he was included. A conflict having thus arisen, the Technical Education Committee determined on 30th September, 1918, to close their schools, and took legal advice in October, 1918, as to their position in relation to the members of the staff; and they were advised by very eminent counsel that in the case of Mr. Comerton six months', or possibly twelve months', notice of termination of his employment would be required. Negotiations were in the meantime going on with the Department in the hope of being able to come to an arrangement for reopening the schools. On 31st October, 1918, notices were served on the members of the staff terminating their services, but they all, with the exception of Mr. Comerton, agreed to accept one month's

K. B. Div. 1921.

R. (Limerick Corp.) *v.* L. G. B.

Samuels J.

notice on the understanding that if a settlement could be made with the Department the notices should be withdrawn, and they should resume their positions as formerly. Matters were ultimately arranged with the Department, and the schools were reopened. Mr. Comerton had not been party to the arrangement come to with the rest of the staff; and a notice signed by the Mayor of Limerick was served on him on the 12th November, 1918, to terminate his employment on 31st July, 1919. On 13th December, 1918, the schools were re-opened by arrangement with the Department, a scheme, dated November 25th, 1918, having been sanctioned. The Department approved of the scheme on 17th December, 1918. All the former members of the staff, including Mr. Comerton as principal, were individually mentioned in the scheme and schedules, and all salaries were paid up to 31st December, 1918. Mr. Comerton contended that his notice of dismissal was waived by the adoption of this scheme. A majority of the committee contended that his case was exceptional, and that the notice of dismissal for 31st July, 1919, was not waived or withdrawn. Difficulties again arose between the Department and the committee, which culminated in September, 1919, the committee refusing to acknowledge the Department. I think it unnecessary to go into the details of the dispute between the committee and the staff.

I have come to the conclusion that there was a bona fide contest between Mr. Comerton and the majority of the committee on the question whether he had been dismissed, or the notice of dismissal waived; but whether the notice was waived or was not waived, or whether a twelve months' notice, as had been advised by counsel might possibly be held necessary by a jury, was required to terminate his employment as headmaster of a technical institute, are not matters that, in my opinion, invalidated his position as an existing officer on 3rd June, 1919, when the Local Government (Ireland) Act, 1919, came into force. In my opinion he was such an officer at that date, and the Local Government Board had jurisdiction to enter on the inquiry. Having then jurisdiction in the matter, the Board, under sect. 8, sub-s. 1, were empowered to determine the right to and the amount of his allowance. It is contended that Mr. Comerton was dismissed by the notice terminating on 31st July, 1919; and that as the sealed order of the Local Government Board, 26th January, 1920, is based upon the recital that Mr. Comerton had resigned his office on the 23rd November, 1919, with the sanction of the Department of Agriculture and Technical Instruction, it is therefore erroneous on the face of it. I do not consider that this is a valid objection; whether there was a resignation or a dismissal was a matter for adjudication by the Board. Assuming even that the Court could inquire into it, it is evident that there was a question whether there had been a valid dismissal or not, or whether the notice of dismissal had been waived, and apparently with the object of removing doubt, Mr. Comerton did send in a formal resignation with the assent of the Department; but whether the Local Government Board was correct in concluding that he had resigned rather than be dismissed is, in my opinion, immaterial, once we come to the conclusion that the Board had jurisdiction to enter upon the inquiry. There is a mass of authority to establish this proposition.

The cases are very fully discussed in *Mahony's Case* (1); and quite recently and exhaustively in *Rex* v. *Murphy* (2), where Molony C.J. summarized the law thus:—"When the Court (that is, an inferior Court) has jurisdiction to decide a matter, its jurisdiction is not ousted because it happens to give an erroneous decision; and it certainly cannot be deemed to exceed or abuse its jurisdiction merely because it incidentally misconstrues a statute or admits illegal evidence, or rejects legal evidence." A tribunal such as the Local Government Board occupies a similar position; and if it acts intra vires its decision cannot be questioned where, as in this case, it is exercising the statutory authority to determine the right to an allowance. The Board was acting within its jurisdiction, in my opinion, in determining that Mr. Comerton's case was one of resignation, and not of dismissal from office. This was not a collateral matter, but was part of the very issue the Board had to inquire into; and even if they were in error (I do not say they were in error) in determining that it was a case of resignation, their decision is, in my opinion, not open to review: *R.* v. *St. Olave's District Board* (3). It was also urged that the Local Government Board did not hold a proper judicial inquiry and exercise a bona fide judicial discretion. The affidavit of Mr. Barlas, Secretary of the Board, filed 15th February, 1921, states the procedure adopted by the Board in the inquiry. In my opinion, in discharging its semi-judicial functions, the Board, by this procedure, gave an opportunity to all the parties interested to present their views. The Board can control its own procedure as an executive department acting as a tribunal in such inquiries; and I can see no ground for impeaching its decision on the ground of the procedure adopted in this case: *Local Government Board* v. *Arlidge* (4).

The sealed order determined as follows:—"1. The said James Comerton is entitled to receive an allowance from the local authority from the time of his resignation." "2. The amount of said allowance is the sum of three hundred and eleven pounds, six shillings, and eight pence per annum, payable in equal monthly payments on the twenty-third day of each month."

The words of the sealed order follow the precise words of sect. 8, sub-s. 1, of the Local Government (Ireland) Act, 1919: "he shall . . . be entitled to receive from the local authority an allowance." The "local authority" is defined in the same sect. 8, sub-s. 5. "Local authority" means the council of any county, county borough, or county district, the commissioners of any town, and the guardians of any poor law union. The County Borough of Limerick is the "local authority" liable within the terms of the section to make the allowance. The Technical Education Committee is not a local authority within the definition, nor is it a local authority within the definition in the Technical Instruction Act, 1889. No order under the section could be made against it. It is not imaginable that the Department of Agriculture and Technical Instruction could be the local authority from whom the officer was to receive the allowance. In my opinion the sealed order was made in the only form in which it could properly be made, and the question

(1) [1910] 2 I. R. 695.
(2) [1921] 2 I. R. 190, at p. 226.
(3) 8 E. & B. 529.
(4) [1921] 2 I. R. 120.

K. B. Div. 1921. R. (Limerick Corp.) v. L. G. B. Samuels J.

of how it is to be enforced hereafter does not arise upon the present application. But it has been strongly pressed that there was no power to make the order imposing liability on the Corporation in the case of an officer such as Mr. Comerton, who was the officer of a committee of the local authority, and not of the local authority itself; and that the order was, accordingly, ultra vires and should be quashed, as the Corporation were not the paymasters, and he was not under their control. In my opinion sub-s. 3 of sect. 8 of the Act of 1919 puts an officer such as Mr. Comerton, who was a whole-time officer of the committee, in the same position as if he had been a pensionable officer holding office directly under the Corporation itself. The committee under the Technical Instruction Act, 1889, sect. 1, sub-s. 2, and the Agriculture and Technical Instruction (Ireland) Act, 1899, sect. 14, sub-s. 1, is the delegate of the local authority exercising under sect. 1, sub-s. 2, of the Act of 1889 any powers delegated to it by the local authority which under the Act are exercisable by the local authority other than the financial powers of raising a rate or borrowing money. If the local authority appoints a committee, then that committee is the agent and representative of the local authority in employing and dismissing the staff engaged for technical education. There is no obligation on the local authority to appoint a committee. It can act itself in administering the Technical Instruction Acts, but if it appoints a committee, then that committee is the medium through which the local authority acts. It is the County Borough of Limerick, and not the committee, that, under sect. 16, sub-s. 1 (i), of the Act of 1899, is to receive from the Department its proportion of the £55,000 grant which shall be applied by it in aid of a scheme approved of by the Department for the purposes of technical instruction. Under sects. 6 and 7 of the Technical Instruction Act of 1889 the receipts and expenditure of the urban authority under the Act are audited in the same manner and with like incidents as their accounts and expenditure under the Public Health Act, 1878. The finance of the system centres round, and is controlled by, the local authority itself, and it is in consonance with the whole of the legislation relating to technical instruction that the pecuniary liability imposed by sect. 8, sub-s. 1, of the Local Government Act, 1919, should be discharged by the local authority, and not by the committee, to which it can delegate only powers other than financial.

In my opinion an order of the Local Government Board purporting to direct that the applicant should be entitled to receive from the technical instruction committee and not from the local authority—that is to say, the Council of the County Borough of Limerick—the allowance determined would be, on the face of it, bad and ultra vires. Nor do I think that it is within the power of the Local Government Board to direct out of what fund or by what means the moneys required to meet the allowances or gratuities should be raised or discharged. It was argued that there is no power to raise for the purposes of technical instruction more than 2d. in the pound on the rateable valuation of the borough, and that the allowances and gratuities awarded by the sealed orders in question would far more than exhaust any possible proceeds of such a rate. I do not think that on the

present application this is a matter for the Court to determine. I consider that any consideration of this kind should be reserved until there is a refusal to pay the awards of the local authority. When it becomes necessary, the matter can be decided on an application for mandamus; but, as the question has been raised, I desire to state that, in my view, the object of sect. 8 of the Act of 1919 is to check capricious and unjustifiable dismissals by local bodies or their committees, on the one hand, and to give some security of tenure to a very important class of officials on the other; and that if there has been an improper removal from office of a servant of a local authority, or a whole-time officer of a committee of a local authority, or a resignation brought about by unreasonable alterations in the conditions of his employment, so that his condition has been materially altered to his detriment, financial responsibility shall be incurred by the local authority which is the financial authority, whether it acts directly or through the medium of a delegate committee. In my opinion the effect of the sealed order of the Local Government Board made under this enactment is to create a debt which the local authority is bound to discharge—not out of funds dedicated to other purposes, but by means of a rate raised to discharge the particular obligation so created. If the obligation is not discharged, the duty can be enforced by mandamus: Local Government (Ireland) Act, 1898, sect. 8: *R.* (*Bennett*) v. *King's County Co. Council* (1).

It is, perhaps, germane to the discussion to bear in mind the fact that under the Restoration of Order in Ireland Act, 1920, sect. 1, sub-s. 3 (1), regulations may be made to provide for the retention of sums payable to any local authority from the Local Taxation (Ireland) Account, or from any Parliamentary grant, or from any fund administered by any Government department or public body where the local authority has in any way refused or failed to perform its duties, or for the purpose of discharging amounts awarded against the local authority in respect of criminal injuries or other liabilities of the local authority, and for the application of the sums so retained in or towards the purpose aforesaid, and it may possibly be found that when payment comes to be enforced, regulations framed under this Act may be in existence which can be utilized to discharge the amounts awarded by the Local Government Board under the sealed orders made in this matter.

In my opinion the conditional order should be discharged in Mr. Comerton's case. As to Mrs. Halpin's case, although she was merely a charwoman, there was evidence to justify the Local Government Board in deciding her right to be regarded as a whole-time officer, and to receive an allowance, and in her case also the conditional order should be discharged.

The amounts awarded in each case were entirely for the Local Government Board to decide.

I consider that Mr. White's application is in the same position.

(1) [1908] 2 I. R. 176.

K. B. Div. 1921. R. (Limerick Corp.) *v.* L. G. B.

Molony C.J.:—

Under the Technical Instruction Act, 1889, a local authority is authorized, out of the local rate, to supply or aid the supply of technical or manual instruction, subject, however, to the limitation that the amount of the rate to be levied in any one year by a local authority for the purposes of the Act shall not exceed the sum of one penny in the pound. The Act further provided by sect. 1, sub-s. 2, that a local authority, for the purposes of the Act, might appoint a committee consisting either wholly or partly of members of the local authority, and might delegate to any such committee any powers exercisable by the authority under the Act, except the power of raising a rate or borrowing money.

Under the Agriculture and Technical Instruction (Ireland) Act, 1899, the Department of Agriculture and Technical Instruction for Ireland was created, and there was transferred to the Department the administration of the grant in aid of technical instruction as defined by the Technical Instruction Act, 1889.

By sect. 14, sub-s. 1, of the Act the council of any county were empowered to appoint a committee for the purposes of the Act, consisting partly of members of their own body and partly of other persons; and, by sub-s. 2, any two or more local bodies might, subject to the regulations of the Department, appoint a joint committee for the purposes of the Act.

By sect. 19, sub-s. 2, power was given to the local authorities to raise, by means of an additional rate of one penny in the pound, another fund for certain purposes, but subject to a provision that no money should be applied under the section unless in accordance with the provisions of a scheme approved of by the Department, or for defraying any administrative or incidental expenses incurred, with the approval of the Department, for the purposes of the Act.

[His Lordship having stated the facts as set out ante, p. 76, proceeded:—]

The Corporation of Limerick applied to this Court for a writ of certiorari to quash the three orders in question, on the grounds that they were made without and in excess of jurisdiction; and that James Comerton and Mary Halpin and Patrick T. White had ceased to hold their respective offices before their alleged resignations had been sanctioned by the Department of Agriculture and Technical Instruction for Ireland; and as regards Mary Halpin, on the further ground that she was not a whole time officer. The Court allowed notices of motion to be served in respect of these three persons without prejudice to the right of the Corporation to apply in the cases of the other persons in reference to whom orders had been made.

The case turns principally upon the effect to be given to sect. 8 of the Local Government Act, 1919. The section was inserted in the Act for the purpose, apparently, of preventing local bodies doing an injustice to their whole-time officers; and the way it provided for this was by empowering the Local Government Board to declare in a case where any officer of a local authority who held on the passing of the Act a pensionable office, and who was removed from his office for any cause other than misconduct or incapacity, or resigned his office with the sanction of the Local Government Board, that he should be

entitled to receive from the local authority an allowance not exceeding two-thirds of the salary, fees, and emoluments of which he was in receipt at the time of his removal or resignation, and not less than an allowance calculated according to the scale provided by the Superannuation Acts, 1834 to 1892. If the person had served more than ten years, the allowance was to be calculated according to the Superannuation Acts; but if under ten years, the officer was to get a gratuity according to the scale in part 1 of the seventh schedule to the Local Government (Ireland) Act, 1898. It was, however, foreseen that the right to the allowance, or the amount thereof, might very well be contested by the local authority; and, accordingly, it was provided that the right to and the amount of any such allowance or gratuity should, in case of a dispute, be determined by the Local Government Board. Sub-s. 2 provided for the circumstances in which the Local Government Board was to give its sanction to the resignation of an officer; and sub-s. 3 provides that the section should apply to a whole-time officer of a committee of a local authority, or of a joint committee of several local authorities, in like manner as if he were an officer of the local authority or authorities holding a pensionable office. There is, however, a proviso that in the application of the section to an officer of a committee or joint committee appointed for the purposes of the Agriculture and Technical Instruction (Ireland) Act, 1899, the sanction of the Department of Agriculture and Technical Instruction in Ireland is to be substituted for the sanction of the Local Government Board.

The Local Government Board say that the resignation of Mr. Comerton having been accepted by the Department, their jurisdiction arose, and that they invited the Corporation to make representations in reference to the matter, and that they received a detailed statement from the Corporation which was fully considered by them before they made the said orders; and they submit that the orders were intra vires, and that they are the sole judges as to the right to and the amount of the allowances.

I do not think there is any objection to the procedure which has been adopted in the present case. The duty is cast upon the Local Government Board under the statute, and they proceeded to determine the matter after giving an opportunity to the parties of making representations. As was said by Lord Haldane in *The Local Government Board* v. *Arlidge* (1)—"When the duty of deciding an appeal is imposed, those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties an opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of Law tradition in this country has prescribed certain principles to which in the main procedure must conform, but how much of the proceeding is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration rather than to the

(1) [1915] A. C. 120.

K. B. Div. 1921. R. (Limerick Corp.) *v.* L. G. B. Molony C.J.

exercise of the judicial functions of an ordinary Court; but authorities whose functions are administrative and not in the ordinary sense judicial (such bodies as the Local Government Board) have the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow a procedure which is its own, and is necessary if it is to be capable of doing the work efficiently."

It has been said in reference to Mr. Comerton's pension that his resignation was nugatory, inasmuch as he had been previously dismissed. I am inclined to agree with this contention; but this is a matter of small importance, as undoubtedly he did not cease to be in the employment of the Corporation until the 31st July, 1919, and he was consequently the holder of a pensionable office at the date of the passing of the Act. Objection has been made as regards the excessive amount of the pension and as to the illegality of the Local Government Board taking into consideration a war bonus which had been exclusively provided by the Government; but the determination of the amount of the pension is expressly given by the statute to the Local Government Board.

The real difficulty in this case, however, is as to the power of the Local Government Board to compel the Corporation to pay a pension to a man whom they could not appoint, did not dismiss, and whose salary they never paid.

The committee was duly appointed under the statutory power, and was composed partly of members of the Corporation and partly of other persons. So far as the Corporation was concerned they discharged all their duties in regard to it when they raised and paid over the proceeds of the penny rate. It appears from the financial scheme for the year ending 31st July, 1919, that the estimated income of the committee was £3,224, of which £303 came from the Corporation rate, and the balance mainly by grants from the Department. The committee appointed their whole staff—both permanent and temporary and had the sole power of determining their employment. The Corporation could not raise any more for the purposes of the schools beyond the statutory limit of one penny, or, in certain events which have not arisen, twopence. But the effect of the orders made by the Local Government Board is to require them to pay in pensions the sum of £1,030 16*s.* 8*d.* per annum, and in gratuities the sum of £2,215 4*s.* 5*d.* It is, however, strenuously contended on the part of the officers that they are entitled to be paid this sum by the Corporation out of their general funds, and that sect. 8 of the Local Government Act of 1919 removes the limit of the taxable capacity of the Corporation for this purpose. Where a person is a direct officer of the local authority there is, no doubt, power to grant the allowance, and where he is a direct officer of a committee there is also power to grant the allowance, but the allowance must be a charge upon the funds of the committee, and not a charge upon the general funds of the Corporation. Sect. 8, sub s. 3, says: "This section shall apply

to a whole-time officer of a committee of a local authority, or of a joint committee of several local authorities, in like manner as if he were an officer of the local authority or authorities holding a pensionable office."

The Local Government Board contend that these words make Mr. Comerton a direct officer of the Corporation, and they say that this view derives support from the subsequent words of the sub-section, which provides that in the case of a joint committee the amount of superannuation allowance or gratuity shall be paid by the local authorities in such proportion as may be agreed upon, or, in default of agreement, as may be determined by the Local Government Board. These words would clearly apply to a case where there was a joint committee the entire of whose funds had to be provided by the local authorities; but I do not think they can be made applicable to a case where only a small portion of the fund is payable by the local authority, and there is a statutory prohibition against increasing the amount. It seems to me that the true meaning of this sub-section in reference to this committee is, that it does not make Mr. Comerton an officer of the local authority, but that he is to be treated by his own committee in like manner as if he were an officer of the local authority, that is to say, if he was an officer of the local authority he would be entitled to obtain a pension from the local authority, and that as he is an officer of the committee he may be entitled to obtain a pension from the committee. This construction would supply a reason for the provision which, in the case of a committee, requires the sanction of the Department to be substituted for that of the Local Government Board, because the result of an order would necessarily affect the funds which were coming through the Department to the committee.

In my opinion the order of the Local Government Board declaring Mr. Comerton entitled to receive a pension from the local authority is ultra vires, and ought to be quashed.

The same considerations apply to the orders in reference to Mary Halpin and Patrick T. White. There is, however, no question of dismissal in their cases, as they regularly resigned with the consent of the Department.

It was also sought to quash Mary Halpin's order on the ground that she was not a whole-time officer. This, however, was a matter within the cognizance of the Local Government Board; but it would seem to me that she has established a claim to be a whole-time officer, having regard both to the statements in her own affidavit and to the fact that she was so described in the return made by the committee to the Department.

PIM J.:—

I agree with the Lord Chief Justice. I wish to add a few words.

To repeal by implication one affirmative section of an Act of Parliament by an affirmative section of a subsequent Act, it is necessary to show that the two sections are inconsistent or repugnant.

Sect. 19, sub-s. 2, of the Agriculture and Technical Instruction (Ireland) Act of 1899 gives power to the local authority to raise by means of a rate of not more than one penny in the pound money to

Appeal. (*S. I.*) 1921. R. (Limerick Corp.) *v.* L. G. B. Pim J.

aid technical instruction. That affects all outlay for technical instruction, including pensions.

It is contended that sect. 8 of the Local Government (Ireland) Act of 1919 enables any officer of a committee of any local authority to receive from the local authority the allowance to which he, under the section, is declared entitled. It is argued that the section is inconsistent with sect. 19, sub-s. 2, of the Agriculture and Technical Instruction (Ireland) Act, 1899. I am not of that opinion. I think the two sections can be read together. The Local Government Board knew of the rating limitation in the earlier section, and they could have made an order recognizing such limitation. They have not done so, and their order purports to be effective against all moneys in the hands of the Corporation of Limerick. That is, in my opinion, clearly wrong and should be quashed.

It has been argued that even if the Corporation cannot raise more for the payment of the pensions in question than a penny rate, still the order is, so far, good, and that it should be left to the Corporation to contest the matter by another proceeding. That would be a futile waste of money. The matter can and should be decided on this application.

1921. Nov. 3, 4, 7.

The Local Government Board and the officers appealed to the Court of Appeal in Southern Ireland.

Babington K.C., *A. E. Wood K.C.* (with them *Lipsett K.C.* and *Geoghegan*), for the appellants, the Local Government Board:—

Under sect. 8, sub-s. 5, of the Local Government (Ireland) Act, 1919 (9 & 10 Geo. 5, c. 19), the local authority in this case is the Borough Council of Limerick. Mr. Comerton and the other officers concerned held pensionable offices under that authority at the date of the passing of the Act, and in determining their rights to an allowance under the section it is immaterial whether they resigned or were dismissed. The Technical Instruction Act, 1889 (52 & 53 Vict. c 76), sect. 1, sub-s. 2, provides that "a local authority may for the purposes of this Act appoint a committee consisting either wholly or partly of members of the local authority, and may delegate to any such committee any powers exercisable by the authority under this Act except the power of raising a rate or borrowing money." The committee in this case were really the agents of the local authority. Power is also given by the Agriculture and Technical Instruction (Ireland) Act, 1899 (62 & 63 Vict. c. 50), sect. 14, to the council of any county or of any urban district to appoint a committee consisting partly of members of their own body and partly of other persons.

The rate to be raised in any one year by a local authority for technical instruction was limited by the Technical Instruction Act, 1889, to one penny in the pound. Sect. 19, sub-s. 3, of the Act of 1899 extended the rating power for technical instruction to twopence in the pound. Under sect. 16, sub-s. 1 (*c*) [i], a certain proportion of an annual grant of £55,000 was paid to county borough councils for technical instruction.

The grounds upon which the case was decided in the Court below were that there were no funds out of which the allowances could be paid, and that the officers claiming allowances were officers of the committee and not of the borough council. It was not open to the Court to inquire into the sufficiency or insufficiency of funds. In *The Local Government Board* v. *M'Donnell* (1) Wright J. decided that a technical instruction committee was a committee of the county council, and that there was no distinction between such a committee and the council.

An order made by the Local Government Board within its jurisdiction is not subject to certiorari. A case like the present is *The Queen* v. *St. Olave's District Board* (2), where, in practically similar circumstances, certiorari was refused. [Other authorities cited: *The Queen* v. *Bolton* (3), *Local Government Board* v. *Arlidge* (4).]

Overend K.C. and *Smylie*, for Mr. Comerton and the other officers:—

The sealed orders are good, and if any one of them was not good, the Court should in its discretion refuse to grant certiorari. A decision of the Local Government Board made within jurisdiction is final and conclusive, and is not the subject of appeal.

S. L. Brown K.C. and *T. M. Healy K.C.* (with them *P. Kelly*), for the Corporation of Limerick:—

The orders of the Local Government Board are bad, because they were made without jurisdiction, and because, in making them, the Board did not exercise a bona fide judicial discretion. The conditions precedent to jurisdiction under sect. 8 of the Local Government (Ireland) Act, 1919, are: 1, There must be an officer; 2, he must hold a pensionable office at the passing of the Act: 3, he must (*a*) have been removed from office for some cause other than misconduct or incapacity, or (*b*) he must have resigned with the sanction of the Local Government Board. Here the Board had proceeded on the basis that Comerton had resigned. We submit he had been dismissed. In regard to any of the matters just mentioned, the decision of the Board is not final. This case cannot be distinguished from *R.* (*Wexford County Council*) v. *Local Government Board* (5).

As the only fund out of which the allowances awarded by the Local Government Board could be paid was the proceeds of a twopenny rate, the orders were impossible of performance.

RONAN L.J.:—

The facts of this case are stated in the judgments of the King's Bench Division.

There was no conditional order for certiorari. The Court gave liberty to serve notice of motion. In such a case the Court holds the party bound by the grounds stated in the notice as if they had been

(1) Unreported.
(2) 8 Ell. & B. 529.
(3) 1 Q. B. 66.
(4) [1915] A. C. 120.
(5) [1902] 2 I. R. 349.

Appeal. (*S. I.*) 1921.

R. (Limerick Corp.) *v.* L. G. B.

Ronan L.J.

stated in a conditional order. The Court below were unanimous in favour of the appellants on every point but one, and on that point Samuels J. was also in favour of the appellants. It is a significant fact that this point is not among the grounds in the notice, which were as follows:—1. The said orders and each of them were made without and in excess of jurisdiction, and are bad in law. 2. The said James Comerton, the said Mary Halpin, and the said Patrick T. White had ceased to hold their respective offices before their alleged resignations had been sanctioned by the Department of Agriculture and Technical Instruction for Ireland. 3. The said officers had been lawfully dismissed before their alleged resignations. 4. A bona fide judicial discretion was not exercised by the Local Government Board in making said orders. 5. On the further ground in the case of Mary Halpin that she was not a whole-time officer.

As the greater part of the respondents' argument was directed to No. 4, I shall deal with it first. Claimant could rely either on removal or resignation. Claimant only resigned on the 23rd November, 1919. I shall assume that up to that he had only relied on removal. Mr. Brown then says that the Corporation had no notice of his intention to rely on resignation. The section had been fully considered by the Corporation solicitor. The order was made on January 26th, 1920. The Board had advised claimant "that he should resign in order to place the Board in a position to consider his application."

The Board did not make any communication to the Corporation in respect of this matter. Mr. Brown says that the Board then decided the case on the ground of resignation, the Corporation having no reason to think that this ground would be put forward. Is there any substance in this? It is true Comerton did not say in his letter of resignation: "N.B. I am doing this for the purposes of my pending claim for pension." Was this necessary? Had Mr. Dundon, the Corporation solicitor, any possible doubt on the subject when he saw the resignation? In my opinion the "N.B." was quite unnecessary. Yet its absence is really the sole ground on which Mr. Brown asks us to hold that the Board did not exercise a bona fide judicial discretion in the case.

It appears to me that, having regard to their position, the Board acted with great propriety in the entire matter, and with perfect bona fides, and that their anxiety was to have the real substantial question of the claimant's right to the pension fully before them in all its aspects. I entirely agree with the unanimous view of the Judges in the King's Bench Division on this part of the case, and am of opinion that the respondents have wholly failed to establish their ground for quashing the order. Mr. Brown put his argument on this part of the case solely on this matter of notice to the Corporation that resignation would be relied on.

Before dealing with the other questions in the case, I wish to point out a distinction which seems to have been overlooked. The Lord Chief Justice and Pim J. have strongly relied on arguments tending to show that the claimant can only recover the amount of his allowance out of the penny rate, and that would be practically nothing. Now, it is quite true that a Court in its discretion may refuse to make an order because they think it can have no beneficial result. But

Comerton is not asking for any order; on the contrary, he asks that no order should be made. It is the first time that I have heard the suggestion that a Court will set aside a valid legal order because they are of opinion that the man who has obtained it will be unable to make any profitable use of it.

The last paragraph of the judgment of Pim J. is as follows:—"It has been argued that even if the Corporation cannot raise more for the payment of the pensions in question than a penny rate, still the order is, so far, good, and that it should be left to the Corporation to contest the matter by another proceeding. That would be a futile waste of money. The matter can and should be decided on this application."

The order sought to be quashed is as follows:—"And whereas a dispute has arisen as to the right of the said James Comerton to receive an allowance from the local authority, under sect. 8 of the Act, and as to the amount of any such allowance; and whereas the salary, fees, and emoluments which the said James Comerton was in receipt of at the time of his resignation amounted to £467: Now, therefore, we the Local Government Board for Ireland, in exercise of the powers given to us by sect. 8 of the Act, and all other powers enabling us in this behalf, do by this our order determine as follows:—1, The said James Comerton is entitled to receive an allowance from the local authority from the time of his resignation; 2, the amount of the said allowance is the sum of £311 6*s.* 8*d.* per annum, payable in equal monthly payments on the 23rd day of each month."

It is quite plain that it does not decide "the matter which" (Pim J. says) "ought to be decided on this application." Does this omission make it bad? or is the order "so far good"? If the omission makes it bad, it is bad on the face of it, and there is an end of the case. There is no suggestion of this in the notice of motion, or in the judgments, or in the arguments before us. If the order is "good as far as it goes," why should it be set aside?

The jurisdiction of the Local Government Board is created by the following words in sect. 8, sub-s. 1, of the Act of 1919:—"The right to and amount of any such allowance or gratuity shall in case of dispute be determined by the Local Government Board." This is mandatory. A new right is given by the section; and a special tribunal is given exclusive jurisdiction to determine, 1, the right to the allowance; and, 2, the amount. Both stand on the same footing. I need only deal with the right. There is no doubt that here a dispute as to the right has arisen; and therefore the duty to determine whether or not the right exists is cast on the Local Government Board. What is the right? This: "He shall . . . be entitled to receive from the local authority an allowance." But (apart from the amount) the existence or non-existence of this right is the only matter they are given power to determine. They have no jurisdiction to deal with the question of how the claimant is to enforce the right, or to enforce it by their order, or to deal with the question out of what funds the local authority may or can lawfully pay the money, or to make any order, on anybody to do anything, or to charge any fund with payment. As Dodd J. put it, their jurisdiction is strictly limited to making a

Appeal. (*S. L.*) 1921.

R. (Limerick Corp.) *v.* L. G. B.

Ronan L.J.

declaration of the existence of the right. They have no power to give any consequential or other relief, or to make any other declaration.

In my opinion the statute is absolutely clear as to this. If this is so, it is clear that "if they had made an order recognizing the rating limitation in the Act of 1899," as Pim J. says they should have done, they would have acted ultra vires. It is equally clear that the Lord Chief Justice was mistaken in saying: "The real difficulty in this case is as to the power of the Local Government Board to compel the Corporation to pay a pension to a man whom they could not appoint," etc. If the Local Government Board had gone on to order the Corporation to pay the money, it would have been clearly ultra vires. They have under this section no power to do anything of the kind, and they have not attempted to do it. It may be asked, if this is so, what is the use of such an order? It is this. If the claimant sought to enforce payment of his pension in any Court having power to make orders for payment (to compel people to pay), and the defendants disputed his right, that Court would have no jurisdiction to determine the existence of the right. The exclusive jurisdiction is given to the Local Government Board, and their determination of the right is the condition precedent to the obtaining of any compulsory payment, whether by action of debt, by mandamus, by a receiver, or otherwise. The Legislature has thought fit to say that this question "shall be determined by the Local Government Board," being of opinion that this is the best mode of dealing with it. They are dealing every day with local authorities and with their officers; they are familiar with the law applicable to them, and with their practice and course of proceeding. In dealing with a case of this kind an ordinary Court would have to acquire some information on all these matters. It is obvious that such a dispute as the present could be disposed of much more rapidly and cheaply, and I venture to say better, by the Local Government Board than by any other tribunal. In a great variety of cases similar powers of determination are given to them. Their jurisdiction is exclusive so far as it extends. "Shall be determined" are the words which in the Friendly, Building, and Industrial Societies Acts have always been held to give exclusive jurisdiction. Their decisions within their jurisdiction are final and without appeal. No Court can set them aside on the ground that they are wrong either in matters of fact or matters of law.

The Court which is asked to make a compulsory order will, of course, exercise a judicial discretion having regard to all the facts of the case as to the terms of that order, and they will not ignore the maxim, lex non coget ad impossibilia. I entirely agree with the judgment of Samuels J. on this part of the case. The Local Government Board had nothing to do with these matters; and, with all respect to the Lord Chief Justice and Pim J., I think that neither they nor we have anything to do with them in this case. Our duty is simply to decide whether the declaratory order is bad or not, and I think we should refrain from any attempt to decide by anticipation what a Court asked to enforce payment should do.

The right to the allowance depends on the statutory conditions being complied with. They are as follows:—1, That the claimant, on the 3rd June, 1919, was an officer of a local authority holding a pensionable office; 2 (*a*), he is removed from his office for any

cause other than misconduct or incapacity, or (*b*) resigns with the consent of the Local Government Board. The existence of the right, therefore, depends on three questions:—1, Was he such an officer? 2 (*a*), Was he so removed? 2 (*b*), Did he so resign? The answer "yes" to 1, and the answer "yes" to either 2 (*a*) or 2 (*b*), establish his right. After a little gentle pressure, Mr. Brown admitted he could suggest no other question for the Local Government Board to decide on a case under this Act. Did the statute give them power to decide anything about the right? The decision of a Court of limited jurisdiction is binding on questions which they have jurisdiction to determine; this applies equally to questions of law and fact. A power to decide a question one way only is nonsense. It certainly is not judicial.

The law is settled that where a jurisdiction is given to a tribunal in certain events, the jurisdiction only arises on the actual happening of those events. If they have not happened in fact, they cannot obtain jurisdiction by wrongly deciding that they have happened. Lord Chief Baron Palles used to distinguish questions which go to the jurisdiction from questions on the merits of the case, meaning by the latter those on which the Court could make a binding, effective decision either way. Questions which go to the jurisdiction are called "preliminary questions." If the question of jurisdiction is raised, the inferior Court must decide it before proceeding to try the question on the merits.

Mr. Brown contends that all the questions in this case are preliminary questions, and that therefore the Court can review the decision of the Local Government Board as to all. This, of course, means that there are no questions of merit as distinguished from preliminary questions. Mr. Brown says that may be so; and on the true construction of the statute it is so. The only result is that their decision on every question submitted to them is open to review. No erroneous decision of theirs can be binding. They have no power to make any wrong decision of theirs binding. This is a strange intention to impute to the Legislature. It makes the declaratory order an absolute nullity, as it has no binding effect. The defendant in a proceeding to enforce it can always insist on all questions decided by the Local Government Board being tried over again, as all are questions going to the jurisdiction. Assume for a moment that question 1 is a preliminary question, and question 2 a question of merit. The Local Government Board holds (*a*) that he is such an officer; (*b*) that he resigned. On certiorari the Court is satisfied that (*a*) was right, and (*b*) was wrong. Nevertheless, the order must stand; there was no power to review (*b*) on the ground of error. Assume that (*b*) was a preliminary question, and the decision wrong, the order must be quashed. An erroneous decision on a question of merits is only binding where the tribunal has correctly decided that it has jurisdiction, i.e., has correctly decided all the preliminary questions.

In the *Wexford Case* (1) on a statute similar to this a question arose as to whether certiorari applied to such orders of the Local Government Board. I was counsel for the Local Government Board, and stated that they were anxious to have their orders reviewed by the Court if possible. Notwithstanding this, the Court insisted that I

(1) [1902] 2 I. R. 349.

Appeal. (*S. I.*) 1921.

R. (Limerick Corp.) *v.* L. G. B.

Ronan L.J.

should argue that certiorari did not apply. One of the strongest Courts that ever sat in Ireland—Palles C.B., and FitzGibbon, Walker, and Holmes L.JJ.—would not decide without argument that certiorari applied in the case, but they held it did. On what grounds? On the ground that it was a judicial determination, because the Board could decide questions on which their decisions could not be questioned or reviewed, although clearly shown to be wrong. I read from the judgment of the Lord Chief Baron, at pp. 373, 374: "I have always thought that to erect a tribunal into a 'Court' or 'jurisdiction' so as to make its determination judicial, the essential element is that it should have power by its determination within jurisdiction to impose liability or affect rights. By this I mean that the liability is imposed, or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depend upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorizing it is judicial. It may be proper to state that, of course, the correlative proposition is not universally true. A judicial act by an inferior Court does not always bind even the parties to it. To do so it must be within jurisdiction, and, therefore, if the determination be as to the limits of its jurisdiction and be erroneous, so that the act is in excess of jurisdiction, it will not bind." The ground of the decision in that case was that the Local Government Board had acted in excess of jurisdiction. The test is, can they make a wrong decision binding? Mr. Brown had to admit that on his construction there is no question submitted to them by the Act on which an erroneous decision of theirs could be binding.

It seems to me that this case conclusively shows that where the statute only submits to the Local Government Board questions which go to their jurisdiction, and on which an erroneous determination by them could not possibly be binding, the determination cannot be the subject of certiorari. The only result of Mr. Brown's argument is that if sound it prevents his obtaining a writ of certiorari. It certainly would be a strange construction of the statute to hold that where the Legislature in terms gives the Local Government Board exclusive jurisdiction, without appeal, to determine the right, the Local Government Board have no jurisdiction to make any binding decision on any question on which the right depends. If Mr. Brown is right that all the questions which can arise are of the same class, I think it may well be held that the Legislature gave the Local Government Board jurisdiction to make binding decisions as to every question dealing with the existence of the right, and that the only condition precedent is contained in the words "in case of a dispute." The law on the subject seems to me to be stated with great accuracy and precision in the following passage in O'Connor's Justice of the Peace, vol. i, part i,

pp. 331, 332:—"In a certain class of cases, the High Court will consider and weigh the evidence before the justices . . . In certain other cases, indeed, the statute, in effect, gives it to the justices to determine the particular question and to make orders accordingly, and where this is so such question is not a condition precedent to the jurisdiction, but is really the matter, or one of the matters, the justices themselves have to try; and, therefore, the High Court will not interfere with the justices' finding of fact. In each case it depends, on the construction of the statute, whether the particular question is a preliminary one, or whether in deciding it the justices are in fact exercising the jurisdiction given to them by the statute." Having regard to the view taken by all the Judges in the King's Bench Division and by us, it is unnecessary to go this length.

Samuels J. takes the view at the beginning of his admirable judgment that the only condition precedent was the holding of the office by Comerton on the passing of the Act. This would appear to have been the opinion of Lord Chief Baron Palles and Gibson J. in the *Wexford Case* (1). All the members of the Court of King's Bench Division decided that he was then holding the office; and I agree with them for the reasons stated in their judgments. If so, the question of resignation was not a matter going to jurisdiction. It was a mere question of merits on which a decision of the Local Government Board could not be set aside "on the ground that it was wrong in law or in fact" (*Wexford Case* (1), p. 374). This seems to me conclusive on this branch of the case. Proof that he had ceased to hold the office prior to the resignation would only show that the decision was wrong in law or fact; but as it was within jurisdiction, it could not be set aside on this ground.

Apart from the question of the consent of the Department, which plainly cannot be questioned in this proceeding, the only objection to the resignation was that he had been previously removed. But as it has been found by all the Judges that he held the office on the 3rd of June, this removal must have been subsequent; and this of itself would entitle him to the determination of his right contained in the order. But for the reasons above stated, I am of opinion that the finding of resignation cannot be questioned on the ground that it was wrong in law or fact. Even if the order was quashed on this ground, the Local Government Board could make a valid order the next day, substituting removal for resignation.

I now come to the matter on which the Lord Chief Justice and Pim J. decided the case. The Lord Chief Justice says:—"The real difficulty in this case, however, is as to the power of the Local Government Board to compel the Corporation to pay a pension to a man whom they could not appoint, did not dismiss, and whose salary they never paid." Then he describes the position of the Committee, the revenue at its disposal, and the sources from which it was received. That question is, in my opinion, absolutely immaterial. He goes on to say:—"Where a person is a direct officer of the local authority, there is, no doubt, power to grant the allowance; and where he is a direct officer of a committee, there is also power to grant the allowance; but the allowance must be a charge upon the

(1) [1902] 2 I. R. 349.

Appeal. (*S. A.*) 1921. R. (LIMERICK CORP.) *v.* L. G. B. Ronan L.J.

funds of the committee, and not upon the general funds of the Corporation." I am not going into the question of funds at all. 1. The expression "direct officer" is not in the statute. The judgment seems to limit right to "direct" officers. I do not understand this. 2. The judgment entirely ignores the purely declaratory nature of the order. It was delivered after the judgment of Samuels J., which, in my opinion, had clearly and conclusively dealt with this. 3. The Local Government Board had no power to make the allowance a charge on any fund; and they have not attempted to do so.

As to the construction of sect. 8, sub-s. 3, adopted by the Lord Chief Justice and Pim J., and on which their judgments in the case are entirely founded, my difficulty is that I cannot, after the most careful consideration, see any possible ground for this construction. I therefore feel they must have overlooked something in the section. Samuels J. appears to me to have demonstrated that this construction is wrong; but, strange to say, I have not heard any attempt to criticize his judgment on this matter. Further, there was no real attempt by the respondents' counsel to support this, the sole ground on which the Court below decided in their favour. Mr. Brown opened his argument by an earnest request that we should bear in mind from the start that he was going to support the decision on important grounds not relied on in the judgment of the Court below.

The judgment here amounts to this: that the order is bad in declaring that it was "from the local authority" that Comerton was entitled to receive the allowances; that it should have been "from the committee." And the reason given for this was that, as in the case of an officer of the local authority, the allowance was to be payable by the authority, so in the case of an officer of a committee it should be payable by the committee. I am unable to find in the section the faintest indication of any intention to impose any liability on a committee. The Chief Justice having quoted the four first lines of sect. 8, sub-s. 3, says: "The Local Government Board contend that these words make Mr. Comerton a direct officer of the Corporation." I have heard no such contention. The words make sect. 8, sub-s. 1, "apply to an officer of the committee in like manner as if he were an officer of the local authority." What part of sect. 8, sub-s. 1, is material? Plainly this: "He shall be entitled to receive from the local authority." Is there any possible ambiguity in this when we use the words of the statute? The substitution of "corporation" for "local authority," and the addition of the word "direct," which is not in the statute at all, may perhaps slightly obscure it, but the meaning is plain beyond doubt, viz., he is to be treated for the purposes of the section not as what he is, an officer of the committee, but as what he is not, an officer of the local authority.

Sect. 8, sub-s. 3, provides that in the application of the section to an officer of a committee appointed under 62 & 63 Vict. c. 50, the sanction of the Agriculture Department shall be substituted for that of the Local Government Board. The Lord Chief Justice treats the case as if there was a further proviso, "and in every such case the committee shall be substituted for the local authority." Then the officer would have against his committee the same rights as an officer of a local authority would have against the local authority, and the

committee would be under corresponding liabilities. But there is no such proviso or any trace of any such provision in the Act. Again, the committee is not a corporation. Therefore, "receive from the committee" can only mean receive from the individuals who are members of the committee. When are they to be ascertained? Is the liability joint, several, or joint and several? Is there any limitation of the liability of the individuals? Not being a corporation, they can have no corporate fund.

It is plain on the Act that the officers of the committee and those of the local authority are distinct and different persons. The Act is clear that the officer of the committee is not to be treated as if he was their officer, but as that of the local authority. But the section, clear, precise, and specific, says: "This section shall apply to a whole-time officer of a committee of a local authority, or of a joint committee of several local authorities, in like manner as if he were an officer of the local authority or authorities." That is, the right is given in the one set of words to the officer of a committee and to the officer of a joint committee. Is the right in the one case against the committee, and in the case of the joint committee against the local authorities? Sect. 8, sub-s. 1, made no provision for the case of two bodies being liable. If the liability was on the committee, there would be no distinction between the cases of the committee of one local body and a joint committee. But the liability being on the local body, it became necessary in the case of the officer of a joint committee to make a special provision which was not necessary in sect. 8, sub-s. 1, dealing with the officer of a local authority. Accordingly, sect. 8, sub-s. 3, provides that in the case of an officer of a joint committee the two local authorities should be the bodies liable, and provides for apportionment. The judgment admits that the order should in their case be against the two local bodies, though it still holds that in the case of a single authority it should be against the committee.

For these reasons I think the decision of the King's Bench Division should be reversed.

O'CONNOR L.J.:—

I agree. I express no opinion on the question whether we have power to review a decision of the Local Government Board under sect. 8 of the Local Government (Ireland) Act, 1919, for even if I were of opinion that we had power to review the Board's decision, I think certiorari ought to be refused. Were these officers entitled to pension or were they not? Lord Justice Ronan has dealt with the main proposition underlying the decision of the Court below. That proposition is that the order of the Board involved making the pensions payable out of the pockets of the committee, and not out of the pockets of the local authority. In my opinion that proposition is unsustainable. Furthermore, it appears clear to me that section 8, sub-s. 3, of the Act of 1919 puts the whole-time officers of a committee in the same position as if they were the officers of a local authority.

Appeal. (*S. I.*) 1921.

R. (Limerick Corp.) *v.* L. G. B.

O'Connor L.J.

Section 8, sub-s. 1, says:—"If any officer of a local authority who holds on the passing of this Act a pensionable office is removed from his office from any cause other than misconduct or incapacity, or resigns his office with the sanction of the Local Government Board, he shall, without prejudice to any other right, be entitled to receive from the local authority an allowance not exceeding two-thirds of the salary, fees, and emoluments which he was in receipt of at the time of the removal or resignation, and not less than an allowance calculated according to the scale provided by the Superannuation Acts, 1834 to 1892, and the rules thereunder, if at that time he has served as an officer of the local authority for not less than ten years, or a gratuity according to the scale in Part I of the seventh schedule to the Local Government (Ireland) Act, 1898, if he has so served for less than ten years; and the right to and amount of any such allowance or gratuity shall, in case of dispute, be determined by the Local Government Board." It is quite clear that an officer of the committee in this case who was removed from office after the date of the passing of the Act, or who voluntarily resigned after that date, was entitled as of right to a pension; and neither the right nor the amount depends on whether he was removed or had resigned. All the officers here, including Mr. Comerton, were in their employment under the committee on and subsequent to June 3rd, 1919, the date of the passing of the Act. It follows, therefore, that whether they resigned or were removed after that date is quite immaterial.

Mr. Brown and Mr. Healy submitted that instead of awarding superannuation on the ground that the officers had resigned, the Local Government Board should here proceed on the basis that they had been removed from office. Even if that were so—and I express no opinion whether it was or not—am I to go through the farce of quashing the order in order that the Local Government Board may make a different order, the curial part of which would be in the same terms? The operative part of this order is right, and so far as discretion is concerned we should not quash it merely for the purpose of putting right the preamble.

Was sufficient notice given to the Corporation of Limerick by the Local Government Board of its intention to determine the right of Mr. Comerton and the other officers to pensions? The letter of October 31st was a clear intimation by the Board that it intended to determine the matter. It is clear also that the purported resignation came later and at the suggestion of the Local Government Board. I think the Board should not have made a suggestion of that character to a party who was to come before them as a quasi-litigant. That letter was, however, a sufficiently express notice to the local authority that an inquiry was to be held by the Board. The local authority took up the attitude that they would not attend any inquiry. Pim J. says the order of the Local Government Board is nugatory, because there are no funds or no sufficient funds out of which it can be satisfied. That consideration is quite irrelevant. I think the order of the Court below should be set aside.

DODD J.:—

I agree with the Lords Justices in the result, that on the construction of the statute the duty of deciding whether the applicants for a pension were entitled to a pension is cast upon the Local Government Board, and that in the circumstances of this case we have no right to intervene.

I desire to examine closely into the judgments of the Chief Justice and Mr. Justice Pim. No effort has been made to sustain the reasoning in them; it is my duty notwithstanding to deal with them. As for the Chief Justice's judgment, the only part needing examination is his construction of sect. 8, sub-s. 3. I adopt the reasoning of Mr. Justice Wright in *The Local Government Board* v. *M'Donnell* (1), to the effect that the presence on the committee of members who are not on the council does not alter the constitution of the committee as a committee of the council. The rest of the Chief Justice's decision is as to the limitation of the power of the council to raise more than 2d. in the pound. Mr. Brown relies strenuously on this, but he calls it two pennies. The use that is made of this is that you should not construe sect. 8, sub-s. 3, in a sense that would impose a burden that there were no funds to pay. And therefore Molony C.J. says: "I do not think they [the words in the sub-section] can be applicable to a case where only a small portion of the fund is payable by the local authority, and there is a statutory prohibition against increasing the amount." He does not show any construction that sustains this. But he proceeds: "The true meaning of this sub-s. in reference to the committee is that it does not make Mr. Comerton an officer [meaning a direct officer] of the local authority, but that he is to be treated by his own committee in like manner as if he were an officer of the local authority, that is to say, if he was an officer of the local authority he would be entitled to obtain a pension from the local authority, and that as he is an officer of the committee he may be entitled to obtain a pension from the committee."

To this construction there are three objections: 1, there is no provision in the Act for any pension from the committee; 2, it was conceded in *Brophy* v. *Technical Education Committee of Limerick* (2), and is undoubted law, that neither the committee nor the Department has any power of granting a pension eo nomine; and 3, if the question of funds be capable of being taken into account, this would relegate Mr. Comerton from the Corporation that had some funds to a committee that had no funds. But further, I think there is clear authority that this question of funds cannot be taken into consideration in construing the Act.

A similar effort was made in *Levingston* v. *The Guardians of Lurgan Union* (3). There an action was brought against the Guardians for injury caused to the plaintiff by making a sewer, and discharging sewage from the workhouse into a stream to the use of which the plaintiff was entitled. It was held that the action was maintainable, though it did not appear that the rates or other corporate property of the Guardians were applicable to satisfy the damages which might be recovered by the plaintiff. It was further held that the question of

(1) Unreported. (2) 50 I. L. T. R. 181, 188. (3) I. R. 2 C. L. 262.

Appeal. (*S. I.*) 1921.

R. (Limerick Corp.) *v.* L. G. B.

Dodd J.

funds was not an element for consideration in construing the statute. There was a whole volume of authorities cited. I quote the words of Lord Chief Justice Whiteside in giving judgment.—"The argument was this, that although a section could not be found expressly negativing the right to bring this action, yet, upon a review of the entire Act, it would be seen that the Legislature by necessary implication meant that such a right should not exist." The decision was the decision of a Court composed of Whiteside C.J., Pigot C.B., O'Brien J., FitzGerald B., FitzGerald J., Deasy B., and George J. And the decision on this point reversing the Common Pleas was in the words following:—"The use which was made of them [sections of the Irish Poor Relief Act] in the judgment of the Court below, and in the argument addressed to us here, was this: that supposing the plaintiff got judgment he could not touch the rates under an execution for his damages, and therefore that he was not entitled even to a judgment; and this was the fallacy which ran through the judgment below and the argument here." The cases relied upon are cited in the judgment. *Coe* v. *Wise* (1) was approved of, and the decision of Mr. Justice Blackburn, the dissenting judge in the Queen's Bench, was approved of by the Exchequer Chamber. His words, as interpreted by Whiteside C.J., I may adopt. He "treated as a matter unnecessary to be determined for the purpose of deciding the case before him the question whether the payment of the amount recovered in the action could or could not be enforced by a rate, the source of the funds which would be at the disposal of the defendants." Chief Justice Whiteside, at p. 218, says: "We must, I think, now consider that to have constituted the ratio decidendi of the Court of Exchequer Chamber in their determination of the case upon appeal." That was the decision in 1866 of the Court of Exchequer Chamber in England presided over by Erle C.J. (1). The same, or a similar contention, was years later (in 1901) raised in the case of *Wheeler* v. *Commissioners of Public Works* (2). It was urged there that the facts that the Commissioners of Public Works had no funds, that their expenses were defrayed solely out of moneys provided by Parliament, and that Parliament had not provided moneys out of which the plaintiff could be paid, relieved them from liability (*a*) as showing they were servants of the Crown, or (*b*) as trustees for the public, and that the action was not maintainable, they having no funds. This Court disallowed the contention. Palles C.B. decided that it established the proposition that they were servants of the Crown. He had already so held in *Murphy* v. *Soady* (3). But the other members of the Court, Fitzgibbon L.J., Walker L.J., and Holmes L.J., decided they were trustees. And if that were their position, Palles C.B. concurred that the want of funds would not avail them.

It may be said these cases were cases of tort, and do not apply either to a contract or a statutory right. But it was, I think, conceded early that it was not a defence in contract. In *Kendall* v. *King* (4), which was an action of contract against the visitors of a lunatic asylum for work and labour in respect of certain drawings and plans for the erection of an asylum, Crowder J. says: "No authority,

(1) L.R. 1 Q.B. 711.
(2) 1 N.I.J.R. 249.
(3) 1 N.I.J.R. 255.
(4) 17 C.B. 483.

however, has been cited to show that an action cannot be maintained because there are no funds. On the contrary, two cases have been referred to, *Wormwell* v. *Hailstone* (1) and *Emery* v. *Day* (2), though the latter is not an affirmative decision, which show that the action will lie." Those were cases in which judgment was sought. What is challenged here is a decision by a statutory tribunal declaring a right.

The sub-section is simple and clear: "This section shall apply to a whole-time officer of a committee of a local authority in like manner as if he were an officer of the local authority." Whether there were any funds, or what the source from which the funds may come to pay the pension may be, or whether the funds may be apportioned, is not relevant in any inquiry as to whether Comerton has a right to a pension.

I do not say that in no circumstances could decisions of the Local Government Board be reviewed by this Court.

Solicitor for the Local Government Board: *J. Mecredy.*
Solicitor for James Comerton and others: *J. Mecredy.*
Solicitor for Corporation of Limerick: *John Dundon.*

C. L.

(1) 6 Bing. 668. (2) 1 C. M. & R. 245.

K. B. Div.
(S. I.)
1922.

Feb. 7.

In the MATTER of an INTENDED ACTION. ATKINS *v.* THOMPSON.

Practice—Writ of Summons—Service of writ out of the jurisdiction—Or. 11, *r.* 1 (*e*)—*Order limiting plaintiffs' right to recover at the trial.*

Where it was doubtful whether a case came within the provisions of Or. 11, r. 1 (*e*), the Court made an order giving leave to issue writ, and serve same out of the jurisdiction, limiting the plaintiffs' claim to the causes of action in respect of which it should appear at the trial that a writ of summons could have properly been served out of the jurisdiction.

Thomas v. *The Duchess Dowager of Hamilton* (17 Q. B. D. 592) and *Rowland* v. *Cunningham* (unreported—Irish Court of Appeal, June 24, 1921) applied.

Form of Order.

Motion Ex parte.

In October, 1920, a director of the plaintiff company, who are merchants carrying on business in Cork, interviewed Messrs. Coyle & Co., insurance brokers, in Cork, and instructed them to effect for the plaintiffs an insurance for six months against riot, &c., in respect of certain premises of the plaintiffs. Messrs. Coyle & Co. duly handed to the plaintiffs a cover note, dated 18th October, 1920, and purporting to cover plaintiffs' premises for £2,000 for six months at 15*s.* per cent., and the plaintiffs then and there paid £15 premium. Messrs. Coyle & Co. duly effected a policy at Lloyd's, dated October 27th, 1920, with the intended defendant and twenty-two other underwriters, and the policy was delivered to the plaintiffs by Coyle & Co. at Cork. On December 28th, 1920, the insured premises were destroyed, but the defendant and his co-underwriters refused to pay. The present application was for leave under Or. 11, r. 1 (*e*) (1), to issue a writ and serve it out of the jurisdiction.

Hungerford, for the intended plaintiffs, referred to *Ward* v. *Harris* (2). The cover note was in itself the contract: *Thompson* v. *Adams* (3). [He also cited *Kelly* v. *London & Staffordshire Fire Insurance Co.* (4).] *Sanderson* v. *Cunningham* (5) is distinguishable; in that case the contract was completed by acceptance in London of the plaintiff's proposal.

Molony C.J. made a special order following the form in *Thomas* v. *The Duchess Dowager of Hamilton* (6) and in *Rowland* v. *Cunningham* (7).

The curial part of the order was as follows:—"That the said John Atkins & Co., Ltd., as plaintiffs, be at liberty to issue a writ of summons against the said William Ashcroft Thompson, as defendant, for service out of the jurisdiction, provided that the plaintiffs' claim in the action shall be limited to the causes of action in respect of which it shall appear at the trial that a writ of summons could have been properly served out of the jurisdiction (within Or. 11, r. 1); and thereupon that the service of the said writ and of this order, to be made on the defendant personally in England, be good and sufficient service of the said writ, and that the said defendant do have fourteen days to enter an appearance in this action."

Solicitors for the intended plaintiffs: *Gregg, Jermyn, & Sons.*

T. C. T.

(1) See *Dublin Gazette*, Oct. 11, 1921.
(2) 8 L. R. Ir. 365.
(3) 23 Q. B. D. 361.
(4) 1 C. & E. 47.
(5) [1919] 2 I. R. 234.
(6) 17 Q. B. D. 592.
(7) Unreported—Irish Court of Appeal, June 24, 1921.

BELL *v.* BELL (1).

K. B. (Mat.)
S. I.
1922.
Jan. 27.

Practice—Matrimonial—Default of appearance and answer—Service of summons to fix mode of trial—Or. 19, *r.* 10; *Or.* 70, *r.* 94.

Where a respondent in a matrimonial cause fails to appear to the citation, the summons to fix mode of trial may be sent to him by registered letter.

Semble, the order itself may also be sent in the same way.

SUMMONS.

By petition dated December 7, 1921, Evadne Bell sought a decree for restitution of conjugal rights against her husband, Isaac Bell, he having refused cohabitation since July, 1921. The petition was verified by affidavit filed December 13, 1921, and on December 14 a citation was issued in the usual form directing the respondent to appear within eight days, and stating that in default of appearance the Court would proceed to hear the charges proved in due course of law, the respondent's absence notwithstanding, and that in case of such default the respondent would not be allowed to address the Court either in person or by counsel at any stage of the proceedings. The citation, together with a certified copy of the petition, was duly served on the respondent personally on December 19, 1921; but no appearance was entered to the citation, nor was any answer put in to the petition. On January 20, 1922, a summons was issued to fix the trial before a Judge without a jury, and also asking that the order made thereon should be served by registered post on the respondent. This summons, in accordance with the usual practice in such cases, was sent to the respondent by registered post on January 20, 1922.

P. A. O'C. White for the petitioner, in moving the summons, asked that the order fixing the mode of trial should be served on the respondent by registered post.

The practice is not clear in these cases. Neither Or. 11 nor Or. 19, r. 10 (which provides for service by filing where a defendant has not appeared), is among the rules made applicable by Or. 70, r. 94, to proceedings not in matrimonial causes and matters. It is the practice in these cases to serve the summons by registered post, and I submit that the order should be sent in the same way. In any event, in view of the form of the citation, I submit that there is no need for any form of service whatever.

(1) Before DODD J.

K. B. (*Mat.*) *S. I.* 1922.

BELL *v.* BELL.

DODD J.:—

The practice and procedure in matrimonial matters, which I am enjoined by the statute of 1870 (1) to follow, required all matrimonial matters to be carried out with the utmost circumspection. I think the notice of trial should be supplemented, and a copy of the order sent by post. Sect. 13 of 33 & 34 Vict. c. 110 provides that "in all suits and proceedings the said Court for matrimonial causes and matters shall proceed and act and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts of Ireland have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders to be made by the said Court under this Act." No. 53 of the Irish Canons of 1634 provides that "in all proceedings to divorce and nullities of matrimony good circumspection and advice be used, and that the truth may (as far as is possible) be sifted out by the deposition of witnesses and other lawful proofs and evictions, and that credit be not given to the sole confession of the parties themselves, howsoever taken upon oath either within or without the Court" (Kisbey, Matrimonial Practice, p. 24). Reading these together, it is clear that the Common Law rules for serving by filing are not conformable to the practice of this Court.

Solicitors for the petitioner: *Casey, Clay, & Collins.*

T. C. T.

(1) 33 & 34 Vict. c. 110.

JAMES CREAN & SON, LTD., *v.* J. STEEN M'MILLAN.

Appeal.
(S. I.)
1921.
May 26, 27.

High Court of Appeal.
1922.
Feb. 7, 8, 24.

Practice—Costs—Counterclaim identical with defence—Claim dismissed with costs—Counterclaim dismissed with costs—Principle of taxation.

In an action for the price of goods tendered and refused and for damages for breach of contract the plaintiffs' claim was dismissed with costs, and the defendant's counterclaim for damages for failure to supply the goods was also dismissed with costs. The substantial question on which the defendant succeeded in the defence was the same as that raised by the counterclaim. The Taxing Master taxed the costs of the defendant as if there had been no counterclaim, and gave him the general costs of the action, deducting any costs incurred by reason of and solely attributable to the counterclaim. He gave the plaintiffs only such costs as were incurred by reason of and solely attributable to the counterclaim, and allowed them none of the costs incurred in the action that would have been incurred if there had been no counterclaim. The plaintiffs moved that the taxation of the defendants' bill of costs should be reviewed on the ground that the master should have apportioned the charges which were common to the original action and the counterclaim.

The King's Bench Division (Molony C.J., Dodd and Pim JJ.) *held* that the Taxing Master had taxed the costs on correct principles, and refused to review the taxation.

On appeal to the Court of Appeal in Southern Ireland, the Court (Ronan and O'Connor L.JJ., Campbell C. having resigned before judgment was delivered) being equally divided, the decision of the King's Bench Division stood affirmed.

On appeal, the High Court of Appeal for Ireland (Ross C., O'Connor M.R., and Andrews L.J.), agreeing with O'Connor L.J., affirmed the decision of the King's Bench Division.

Where a separate and substantial question is raised by a counterclaim, substantial costs are taxable in relation to the counterclaim, and in such a case there must be apportionment; but where the subject-matter of a counterclaim is substantially the same as the defence or part of the defence, the costs should not be apportioned, and only such extra costs should be allowed as were incurred by reason of the counterclaim.

By a contract in writing dated the 26th July, 1918, the plaintiffs agreed to sell and deliver to the defendant, and the defendant agreed to buy from the plaintiffs ten tons of dripping at the price therein mentioned, the delivery to be ex plaintiffs' works by weekly or monthly deliveries up to the end of October, 1918. Portion of the dripping was delivered and paid for, but the defendant refused to accept delivery of the balance, on the ground that the goods were not sent or tendered to them within the stipulated time.

This action was brought by the plaintiffs claiming £89 12*s.* 5*d.*, the price for goods tendered and refused, and £346 3*s.* for damages for breach of contract, representing the loss on resale of the balance of the goods.

The defendants by their defence pleaded that the goods were not sent or tendered within the agreed time, and that they had accordingly cancelled the contract; and they counterclaimed £57 12*s.* 8*d.*, damages for loss sustained by reason of the plaintiffs' alleged failure to deliver the goods within the stipulated time.

The action was tried before Gordon J., without a jury, on the 23rd July, 1920, and in the result the learned Judge dismissed both claim and counterclaim with costs.

Subsequent to the taxation of the costs in the action the plaintiffs brought in an objection to the principle on which the defendants' bill

Appeal. (*S. I.*) 1921.

CREAN v. M'MILLAN.

of costs was taxed, submitting that the principle on which the bill should be taxed was that set forth by Ridley J. in *Fox* v. *The Central Silkstone Collieries, Ltd.* (1).

The report of Master Denning, dated the 16th February, 1921, was as follows:—

The following are my grounds and reasons for my decision on the objections of the plaintiffs to the disallowances in their bill of costs and to the allowances in the defendants' costs respectively taxed by me herein.

I beg to refer to the judgment herein of the 24th July, 1920. The plaintiffs object to the principle on which I have taxed their costs and the defendants' costs, on the grounds that I should have apportioned the charges in both bills which were common to the original action and the counterclaim, and that the plaintiffs are entitled to the general costs of the counterclaim. In support of their objection the plaintiffs rely on the following authorities:—*National Gas Engine Co.* v. *Dolphin's Barn Brick and Tile Co.* (2), *Henderson* v. *M'Tear* (3), *Fox* v. *Central Silkstone Collieries, Ltd.* (1), *Kennedy* v. *Healy* (4).

I consider I am bound by the decision in the case of *Duffy* v. *O'Meara* (5), followed in the King's Bench Division and the Court of Appeal in *Coulter* v. *Craugh* (6), and also *Atlas Metal Co.* v. *Miller* (7). The order in this case is in the same terms as in the case of the *Atlas Metal Co.* v. *Miller* (7). I have taxed the costs of the defendant as if there was no counterclaim, giving him all the general costs of the action, but deducting from him any costs that were incurred solely by reason of and attributable to the counterclaim. I have taxed the costs of the plaintiffs, giving them only such costs as were incurred solely by reason of, and attributable to, the counterclaim, and I have allowed them none of the costs incurred in the action that would have been incurred if there were no counterclaim.

I have been asked to apportion the counsels' fees, but being of opinion that the fees given to counsel were not increased by reason of the counterclaim, and following the decision in the *Atlas Metal Co.* v. *Miller* (7), I have declined to do so.

The plaintiffs applied to the King's Bench Division for an order that the taxation both of the plaintiffs' and defendants' bills of costs should be reviewed, on the ground that the Taxing Master had gone wrong in principle, and that he should have taxed both bills on the principle set forth in the judgment of Ridley J. in *Fox* v. *Central Silkstone Collieries, Ltd.* (1).

This motion was refused with costs, whereupon the plaintiffs applied by way of appeal to the Court of Appeal for Southern Ireland, which was equally divided, and the decision of the King's Bench Division accordingly stood affirmed.

Dickie K.C., *Lardner K.C.*, and *Devitt*, for the appellants.
Serjeant Hanna K.C. (with him *A. W. Burke*), for the respondents.

(1) [1912] 2 K. B., at p. 600.
(2) 44 I. L. T. R. 248.
(3) [1906] 2 I. R. 526.
(4) [1897] 2 I. R. 258.
(5) 5 I. W. L. R. 147.
(6) 3 N. I. J. R. 158.
(7) [1898] 2 Q. B. 500.

RONAN L.J.:—

This case was fully argued before the late Lord Chancellor, my colleague, and myself. I think it right to say that the Lord Chancellor had written his judgment in the case, which contained an exhaustive analysis of all the authorities bearing on the subject. I shall hand this judgment to the officer of the Court.

Prior to the Judicature Act, if no special order was made and a plaintiff got a verdict in an action, this gave him the general costs of the action, but the defendant was entitled to have deducted from these costs the costs of any issues on which he succeeded, e.g., plaintiff sues for £200; defendant denies the debt and pleads a set off of £200; plaintiff disputes the entire set off; plaintiff proves debt; defendant proves set off to extent of £100; plaintiff gets a verdict for £100 and the general costs of the action; the defendant gets the costs of the issue of set off, but this meant generally costs exclusively attributable to that issue: see Bewley and Naish, pp. 57–58. Only a liquidated debt could be set off, and it could only be used to defeat the plaintiff's claim. If the defendant, in the case I have put, proved a valid debt for £300, he could not get judgment for £100 against the plaintiff; he would get credit for £200 and the general costs of the action. He had to bring a cross action to recover the £100. So if his claim against the plaintiff was not a liquidated debt, it could only be recovered in a cross action. But the effect of this was that if he succeeded in his cross action, he would get his full costs of the cross action. The expression used in the case, "a real counterclaim," as distinguished from a set off, means a claim which prior to the Judicature Act could only be enforced in a cross action to recover the £100; so if his claim against the plaintiff was not a liquidated debt, it could only be recovered in a cross action. But the effect of this was that if he succeeded in his cross action, he would get his full costs of the cross action. The expression used in the law, "a real counterclaim," as distinguished from a set off, means a claim which prior to the Judicature Act could only be enforced in a cross action. Order 19, rule 3, provides—"A defendant may set off or set up by way of counterclaim . . . . any right or claim, whether it sounds in damages or not, and such set off or counterclaim shall have the same effect as a cross action." The object of this was to dispense with the extra cost caused by two actions. It is obvious that if the defendant was put in a worse position as to costs than in a cross action, no defendant would adopt this procedure.

Under the old law there was in substance and in form only one action. The defence of set off was only a defence in that action; it was in no sense a cross action or treated as such. The costs of the set off were simply treated as costs of an issue in the action. The two things are the general costs of the action and the costs of a particular issue in the action, i.e., exclusively arising from it. If the plaintiff succeeds, he gets the general costs, save so far as they were increased by this issue, and the defendants get the increase only. Is this the law as to a real counterclaim? I confess the case of *Sauer* v. *Bilton* (1) seems to me to say that it is. [His Lordship read the head-note and continued:—] The case is certainly a very peculiar one. It was

(1) 11 Ch. D. 416.

Appeal. (*S. I.*) 1921.

CREAN v. M'MILLAN.

Ronan L.J.

shortly after the Judicature Act came into force. Fry J. proceeds on the analogy of the old practice in cases of bill and cross bill. The defendant's counsel argued that "where a cause and cross cause were dismissed evidence taken in the former and used in both had to be paid for in the cause in which it was taken," that is, there should be no apportionment though it was used in both. This argument prevailed. Fry J., at p. 418, says there were three ways of taking the evidence—1. "It might be taken in both the suits (this means part in one and part in the other), and in that event the costs of the evidence so taken in each suit were, of course, dealt with without difficulty by the judgment in that suit." 2. "The evidence might be taken in one of the suits . . . and an order obtained in the second or other suit to read it with such further evidence as might be necessary. Now, in that event the costs of that evidence were costs in the action or suit in which it was taken, and the costs of the order were costs of the suit in which the order was made; and there was therefore in that case again no apportionment between the two suits." 3. He said evidence might be taken by arrangement or order in both suits, and in that case only there was an apportionment in respect of the costs of the evidence which was common to both suits. He then says: "The question is to which of these proceedings is the present one most analogous. That can only be answered by considering the nature of the present proceeding." That is, the nature of the claim and counterclaim, and the course taken in that case. We have no information whatever as to this, except that it may be inferred that the evidence in the case had been taken by affidavit. He then proceeds: "It appears to me upon the whole that it is most convenient to conclude that the whole evidence, except so far as it is required for the purpose of the counterclaim, is to be deemed evidence in the original action, and therefore I think this case is most analogous to the second of the three modes of taking evidence under the old practice." This may have been so in that particular case.

But the case before us, where the evidence was taken orally at the trial of both claim and counterclaim, seems to me to come almost in terms within No. 3 above. The proceeding was identical with that there described. The entire evidence was, in fact, taken in both suits (though no order was necessary for the purpose), and the case is, therefore, apparently an authority for apportionment in such a case as this, i.e., Case No. 3. The Judge, however, adds: "The principal reason which leads me to that conclusion is this, the plaintiff in the original action is the person who first commences litigation." He then lays down the general proposition in the head-note; but his decision is plainly based on the fact that the case is within No. 2, and not No. 3, and cannot, in my opinion, be regarded as an authority for a case within No. 3. As to the final observations of the Judge, I respectfully adopt the judgment of Younger L.J., when he holds that the effect of such an order is not to give plaintiff such a position of priority in the taxation that the two sets of costs must be on wholly different principles.

Mason v. *Brentini* (1) was a case in which the Court followed the decision in *Sauer* v. *Bilton* (2). No reasons were given. It cannot extend the decision to a case within No. 3 above. For years many

(1) 15 Ch D. 287. (2) 11 Ch. D. 416.

cases, starting with *Saner* v. *Bilton* (1) and including the *Atlas Case* (2), were cited in the Annual Practice on the subject. But that case has been supposed to settle the law, and for some time has been the only case referred to, and *Saner* v. *Bilton* (1), *Mason* v. *Brentini* (3), and the others have disappeared from the Annual Practice; they are not referred to in *Christie* v. *Platt* (4). Both the English and Irish Courts and counsel at the Bar in this case have accepted the *Atlas Case* (2) as a binding authority. It is admitted that the principle is the same, whether the claim or counterclaim succeeds or fails.

In my opinion the head-note of the *Atlas Case* (2) has been the cause of much of the confusion which has arisen. The first two paragraphs of the note plainly suggest that the costs of the claim and the costs of the counterclaim are to be taxed on different principles; that the costs of the claim are to be taxed as if there were no counterclaim, but that the costs of the counterclaim are not to be taxed as if there was no claim, that is, that the plaintiff has a priority in taxation over the defendant. The case, in my opinion, really decides that there is no such priority; on the contrary, that the costs of the claim and counterclaim are to be taxed on the same principle. Lord Justice Lindley, in delivering the judgment of the Court, says as to the costs of the action: "In considering what are the costs of the action, the counterclaim, as distinguished from the defence, ought to be disregarded. The costs of the action ought to be taxed as if there were no counterclaim" (p. 504). He adds further on: "All the authorities agree so far, i.e., they all decide that a plaintiff, who is to pay or be paid the costs of his action, is to pay or be paid the whole of such costs as if there were no counterclaim." He then deals with the counterclaim. "Next, as to the counterclaim. The defendant has to pay the costs of this, and the counterclaim is to be treated as an independent cause of action; and, to use Lord Esher's words, as if the claim did not exist." Nothing can be clearer than this. A claims X against B; B claims Y against A. The costs of X and Y respectively are to be ascertained as if the other did not exist. Each claim is to be taken as an independent action. It therefore does not matter whether A or B was plaintiff or defendant. The two claims are the essential thing, and each is to be taken as if the other did not exist. Unfortunately the head-note of the case, while giving Lord Justice Lindley's statement as to the costs of the action, wholly omits the corresponding statement as to the costs of the counterclaim. Counsel before us contended that this statement as to the counterclaim should not be taken in its apparent sense, urging that it was controlled by other passages in the judgment, and relied on the head-note which omitted this statement as being the correct statement of the effect of the case. It was no doubt limited, but the limitation is very precisely stated. Unfortunately O'Brien J. in the case of *Duffy* v. *O'Meara* (5) quotes the head-note instead of the judgment, and wholly omits the vital statement as to the counterclaim. There is one obvious principle of taxation, i.e., that a party can only recover costs which he has in fact incurred.

(1) 11 Ch. D. 416.
(2) [1898] 2 Q. B. 500, 504.
(3) 15 Ch. D. 287.
(4) [1921] 2 K. B. 177.
(5) 5 I. W. L. R. 147.

Appeal. (*S. I.*) 1921.

CREAN *v.* M'MILLAN.

Ronan L.J.

If a defendant brought a cross action instead of a counterclaim and succeeded, he would be entitled to get the costs of the writ, the costs of service of notice of trial, etc., many items which he has not to pay in the case of a counterclaim, as the plaintiff's writ is the only writ in the action, and there is only one notice of trial, and so of other items.

Lindley L.J. says in reference to this: "This last expression is calculated to mislead if not explained. What are costs of a counterclaim? The answer must be the costs occasioned by it. No costs not incurred by reason of the counterclaim can be costs of it. The fact that if there had been no action the costs of the counterclaim would have been larger, because the defendant would then have had to issue a writ, etc., does not make costs not incurred costs incurred." This is the only limitation of the main proposition. The Lord Chancellor has shown that the judgments of the Court of Appeal in *Christie* v. *Platt* (1) put beyond doubt what the true effect of the *Atlas Case* (2) is.

The judgment of Younger L.J., in my opinion, put an end to all notion of the plaintiffs' priority. In later cases the expressions sometimes used are "costs of claim" and "costs of counterclaim." I think the former preferable to "costs of action." It gets rid of the idea of priority, and of the idea that the old notion of general costs of action and costs of issue applies to claim and counterclaim. It seems to me that the Master here was misled by the omission in the judgment of O'Brien J. of the second of Lord Justice Lindley's principles, i.e., that the counterclaim should be treated as if there was no claim, and that he consequently gave a priority to plaintiff's costs of the action to which he was not entitled. If counsel were given separate briefs and fees for the trials of the claim and counterclaim, and the one was tried first and then the other, the taxation would be simple; the costs of each could be easily ascertained. In practice there is only one brief, one fee, and the two are tried together.

It seems to me that the true principle of the *Atlas Case* (2) is that this should make no difference. That the costs should be apportioned by dealing with them as if there were two briefs and two fees, one for claim and one for counterclaim. Suppose a brief on each side with a single fee of £9 9*s*. The Master might say if there had been action and cross action the plaintiffs' briefs would have been in the action £8 8*s*., and in the cross action 4 guineas, and the defendants' 8 guineas and 4 guineas—that would be 12 guineas to each. But he has only £9 9*s*. to deal with; this is $\frac{3}{4}$ of 12. I think he should apportion the 9 guineas on the same principle that he thought the 12 would have been apportioned by the parties, and that is to allow to each party $\frac{3}{4}$ of each fee marked, i.e., 6 guineas instead of 8, and 3 instead of 4. I think it fair to assume that the fee on the one brief would probably be less than the fees in the two actions.

As to the briefs themselves, it is for the Master to say how much belongs to claim and counterclaim respectively. This applies to the other items of the costs. It seems to me the principal difficulty is in determining what part of defendants' costs is incurred in defeating the claim, and what part in establishing the counterclaim, and vice versa in the case of the plaintiffs. So far as any item relates

(1) [1921] 2 K. B. 177. (2) [1898] 2 Q. B. 500, 504.

exclusively to either, it must of course follow the one to which it belongs. Items common to both must be apportioned as the Master shall think just. I have not thought it necessary to go through the authorities, as, in my opinion, the case of *Christie* v. *Platt* (1) settles the law on the basis I have stated.

O'CONNOR L.J.:—

It is necessary, in the first instance, to have a clear conception of the nature of the action and counterclaim, so that one may appreciate how the costs were incurred; and to that end I have read the entire of the plaintiffs' case for proofs and of the brief held by the plaintiffs' counsel at the trial.

The plaintiffs and defendant entered into a contract in writing, dated 26th July, 1918. By that contract the plaintiffs agreed to sell and deliver to the defendant, and the defendant agreed to buy ten tons of dripping at the price therein mentioned, the delivery, according to the terms of the contract, being ex plaintiffs' works by weekly or monthly deliveries up to the end of October, 1918. Portion of the goods the subject of the contract were delivered and paid for, and there was no controversy in respect thereof. But the defendant refused to take the balance on the ground that the goods had not been sent or tendered to them within the stipulated time. On this the plaintiffs' case seems to have been that there was a waiver by conduct of the term of the contract as to time, the practice being that the goods should be sent on only as the defendant signified he wanted them.

Accordingly, the plaintiffs sued the defendant for £435 15*s.* 5*d.*, £89 12*s.* 5*d.* being for goods sold and delivered—these were apparently goods tendered to the defendant and refused—and £346 3*s.* for damages for breach of contract, being the loss on resale of the balance.

The defendant, by his defence, raised the issue that the goods were not sent or tendered within the agreed time, and that they had accordingly cancelled the contract; and by their counterclaim they claimed £57 12*s.* 8*d.* damages for loss by reason of the plaintiffs' alleged failure to deliver the goods within the agreed time. The learned Judge who tried the action dismissed both claim and counterclaim.

It is very important to note that the issue raised by the counterclaim (save as to damages) was precisely the issue raised by the defence, namely, was there a delivery or tender within the agreed time? And, accordingly, the experienced Taxing Master who taxed the costs in this case came to the conclusion, as his taxation shows (for he awards £5 only as the plaintiffs' costs of the counterclaim), that the costs of the action were not materially increased by the existence of the counterclaim.

As I have said, I have read the plaintiffs' case for proofs and brief, and in the light thereof I can say that in his conclusion of fact —that the costs were not materially increased by the counterclaim—

(1) [1921] 2 K. B. 177.

Appeal. (*S. I.*) 1921.

CREAN v. M'MILLAN.

O'Connor L.J.

the Taxing Master was absolutely right. There is not, curiously enough, in the case for proofs or brief a mention of a counterclaim, good, bad, or indifferent, and, except for the fact that the copies of the pleadings showed that the defendant had a counterclaim on the files of the Court, the plaintiffs' counsel would have been in utter ignorance that the defendant had a counterclaim at all. The case for proofs and brief contain not a word of instructions as to damages on the counterclaim.

In his taxation of the defendant's costs of the action and the plaintiffs' costs of the counterclaim, the Taxing Master has acted on this principle: he has taxed the defendant's costs of the action as if there was no counterclaim, that is to say, awarding him all his party and party costs of the proceedings, excluding all costs incurred solely by reason of and attributable to the counterclaim; and he has given to the plaintiffs such costs as were incurred solely by reason of and attributable to the counterclaim, allowing the plaintiffs none of the costs incurred in the proceedings that would have been incurred if there had been no counterclaim.

The question is, was the Taxing Master right in principle? I think he was. He acted, in my opinion, according to a practice settled for forty years by a series of decisions, which do not conflict, though there are loose expressions used here and there in the course of certain judgments which are irreconcilable with the decisions.

What is the principle disclosed by the authorities? It is thus stated by Lindley M.R. in *Atlas Metal Co.* v. *Miller* (1):—"All the authorities agree so far, i.e., they all decide that a plaintiff who is to pay or be paid the costs of his action is to pay or be paid the whole of such costs as if there were no counterclaim. Next, as to the counterclaim, the defendant has to pay the costs of this, and the counterclaim is to be treated as an independent cause of action, and, to use Lord Esher's words, as if the claim did not exist. This last expression, however, is calculated to mislead, if not explained and properly understood. What are costs of a counterclaim? The answer must be the costs occasioned by it. No costs not incurred by reason of the counterclaim can be costs of the counterclaim. The fact that if there had been no action the costs of the counterclaim would have been larger, because the defendant would then have had to issue a writ and take other proceedings, does not make costs not incurred costs incurred; and in considering what the costs of a counterclaim really have been in any particular case, the costs saved by not bringing a cross action cannot be treated as costs incurred. The introduction of counterclaims has given litigants advantages in this respect. Counterclaims, although cross actions for all purposes of procedure and evidence, cost less than actions, and the party who has to pay the costs of a counterclaim gets the benefit of the cheaper procedure. To include in the costs of a counterclaim any costs not occasioned by its being a counterclaim, but saved by its being what it is, appears to us wrong in principle, and opposed to *Saner* v. *Bilton* (2) and *Ward* v. *Morse* (3)."

(1) [1898] 2 Q. B., at pp. 505, 506. (2) 11 Ch. D. 416.
(3) 23 Ch. D. 377.

Before I come to illustrate and explain the working out of this principle, which, I may remark, seems to me to be a simple matter enough, I will say a word as to the foundation upon which it rests. Fry J., in *Saner* v. *Bilton* (1), speaks of it as resting upon expediency; I prefer to speak of it as resting upon justice. A plaintiff proposes to start an action against a defendant; he knows his risk, which—I am speaking generally, of course—is that he shall pay or receive the costs of his action according to the result; he throws down the gage of battle by issuing a writ. A defendant can accept or reject the challenge, but if he accepts it, he does so on the terms of the challenge, namely, that he shall pay the plaintiff's costs of action should the plaintiff win, and that he shall receive his own costs of action from the plaintiff should the plaintiff lose. That seems to be right and fair; and it follows that by no superimposed proceeding of his own can the defendant add to or take from this liability of the contestants to the costs of the action. If the defendant thinks that, besides his defence, he has ground for an action against the plaintiff, he can try his case either by cross action or by counterclaim. If he chooses the former, there is the liability for costs that I have stated. If he chooses the latter, then his election to take advantage of the plaintiff's proceedings should not affect the costs of the action; his proceeding by counterclaim is, after all, a mere parasitic proceeding, by which, as Lord Lindley points out, he gets the benefit of a cheaper litigation, and there seems to me no reason, founded on expediency or justice, why his counterclaim should disturb the incidence or amount of the costs of the action.

Lord Lindley, in the passage I have quoted, asks, "What are costs of a counterclaim? The answer must be the costs occasioned by it. No costs not incurred by reason of the counterclaim can be costs of the counterclaim." If properly understood, this formula solves every difficulty. I propose to illustrate its working.

Now, the controversy arises as to what are called "common" items. Let us be precise. By a common item I mean an item for work or outlay which serves, or part of which serves, the purpose of the claim and the purpose of the counterclaim as well.

Lord Esher, in *Shrapnel* v. *Laing* (2), defined "common" items as "items in respect of which both parties get the advantage." This looks like the definition which I have ventured to enunciate; but, from what Lord Esher goes on to say, I think his definition, as understood by himself, is something different from mine. He says (at p. 339): "There must be very few of such items; it may be doubted whether there are more than two." If by a "common" item he means an item the whole of which serves the purpose of the claim and the purpose of the counterclaim, I can understand his statement. The notice of trial is a common item of this class, which I called the purely common item. But there is another class to which we must have regard, and this class, for want of a better term, I called the mixed item; and this itself may be divided into two sub-classes – (*a*) the item part of which is claim, part of which is counterclaim, but no part of which is common to claim and counterclaim. An example of this is the defence and counterclaim in a case where the counterclaim is not

(1) 11 Ch. D. 416. (2) [1888] 20 Q. B. D., at p. 339.

Appeal. (*S. I.*) 1921.

CREAN v. M'MILLAN.

O'Connor L.J.

a defence at all, but a separate and independent action fought by way of counterclaim. In such a case a definite part of the pleading is defence; a definite part is counterclaim; no part is common. (*b*) The item part of which is common to claim and counterclaim, and part is claim or counterclaim only. The brief in a case where the issue of fact on claim and counterclaim is the same is an example of this. The evidence on the common issue is common; the evidence on the damages for counterclaim is exclusively counterclaim. Let me glance at the steps in an ordinary action and counterclaim—1. Writ: this is not common, as Lord Esher supposes; the counterclaim has not yet come into being; it is part of the plaintiff's costs of action. 2. The appearance: this is not common; it is part of the defendant's costs of action. 3. The statement of claim: this is not common; it is part of the plaintiff's costs of action. 4. The defence and counterclaim: this item is mixed; part of it serves the purpose of the action and part the purpose of the counterclaim. 5. Reply and defence to counterclaim: like remark. 6. Case to advise proofs: this is mixed, as, presumably, part of it will deal with the claim and part of it with the counterclaim, and part of it may be "common." 7. Steps necessary to bring the action and counterclaim to trial, including notice of trial, setting down action, and so on, including outlay thereon. These items seem to me to be purely common, as they are just as necessary for the counterclaim as the claim; and this would be so likewise if they were taken by the defendant in the cases in which the defendant can take them. 8. Preparation for the trial, the instructions for brief—a comprehensive term, including the attendance on the various witnesses, getting the necessary documents, and so on; these items are mixed. 9. The brief itself; mixed. 10. Fees on briefs: mixed in my opinion. 11. Attendance on counsel with the briefs: mixed. 12. Consultation before trial: mixed. 13. Attendance at the trial: mixed. 14. Term fees: purely common.

Now, some of these items are purely common items: for example, the steps necessary to bring the action to trial, including notice of trial, setting down action, and so on, including the outlay thereon, for the work done serves the purpose of both claim and counterclaim; none of them serves the purpose of one of them only.

The real controversy in this case seems to me to resolve itself into this—what is to be done with the common items, including in this question the "purely common" items and the "mixed common" items? Are they all to be apportioned? And, if so, on what principle? My answer to that is—that the "purely common" items are not to be apportioned; they go to the costs of claim or action. In support of my view, I rely on a forty-year-old practice in the taxing offices as well as on a long line of authority. I think it has never been suggested by any Court, save the curious dictum of Lord Esher, which he makes in *Shrapnel* v. *Laing* (1), that the costs of the writ ought to be apportioned. And it seems to me to follow and to be as well established by the taxing practice and authority that "mixed" items shall be apportioned in this way—apportion to the costs of action the part which deals with the claim only;

(1) 20 Q. B. D., at p. 339.

apportion to the costs of action the "common" part; apportion to the counterclaim the part which deals with the counterclaim; where the service cannot be apportioned in that way, owing to the nature of the fee—counsel's fee on brief, for instance—apportion, in the Taxing Master's discretion, to the counterclaim such part of such fee as, in the opinion of the Taxing Master, is incurred by reason of the counterclaim. The reason why purely common items go in their entirety to the costs of the action is that these items would have been in all respects precisely the same had there been no counterclaim; in other words, there have been no additional costs incurred, so far as these items are concerned, by reason of the counterclaim. And the same reasoning—which is what Lord Lindley laid down—applies to the "mixed" items, which, so far as they are common, will go to the costs of the action.

In looking at the "mixed" items, the Taxing Master will see how much of the work done is common to the defence and counterclaim, and how much is work confined to the counterclaim. In this connexion everything will depend on the nature of the case. There are many cases in which the issue on the counterclaim is precisely the same as the issue on the defence; the present case is one, the issue on both being: were the goods delivered up to time? In such cases the item will be, if not quite all "common" work, nearly all "common" work, and, on the principle that all work that is "common" goes to the action, the costs of the counterclaim will be very small, and in some cases almost negligible. In such a case the Taxing Master may very well give a small bulk fee, £5 or £10 or so, to cover the entire costs occasioned by the counterclaim in respect of pleadings, instructions for brief, fees to counsel, and so on. But there is another class of case in which the counterclaim's "the thing," being a cross action and nothing else. No better illustration of that can be given than that afforded by *Christie* v *Platt* (1). It was an action for rent; the defendant defended on the ground (which was no ground at all for a defence) that the premises were uninhabitable, and he counterclaimed damages for breach of warranty that they were inhabitable. The plaintiff got judgment for £200 and costs; the defendant got judgment on the counterclaim for £225 and costs. Now just look at the proofs in such an action. All the plaintiff had to do was to prove the contract, a merely formal matter, not in dispute; that established the plaintiff's case, and I suppose it did not take five minutes to do it. But then came the counterclaim, a difficult business, one may be sure, requiring expert testimony; it was the matter really debated, and I may go so far as to say the only matter really debated. The Taxing Master taxed the plaintiff's costs at £214 5*s.*, and the defendant's costs of counterclaim at £3 0*s.* 5*d.* It was no wonder that Atkin L.J. said:—"The defendant, who won on the issue involving really all the expense, is allowed £3, while the plaintiff, who succeeded on an unopposed allegation, recovers £214. That must be wrong." In a case of this class, the Taxing Master must apportion the mixed items; he must give the actual work, the work that is entirely common, to the costs of the action, and the work that is purely counterclaim to the counterclaim; and counsel's fees he must apportion in some rational

(1) [1921] 2 K.B. 17.

Appeal. (*S. I.*) 1921.

CREAN v. M'MILLAN.

O'Connor L.J.

manner between both. But that sort of case is quite remote from cases like the present, where the work done was not increased by a decimal fraction per cent. by reason of the counterclaim.

I take the authorities in order of time. The facts of *Saner* v. *Bilton* (1) appear in the report of the case in 7 Ch. D. 815. It was an action by a lessor against a lessee for waste, the lessor alleging that certain injury to the demised premises was caused by the lessee's unreasonable use thereof; this the lessee denied, and counterclaimed for damages on the ground that the premises when demised were unfit for the purpose for which they were demised, and that it was this caused the mischief. Fry J. dismissed both claim and counterclaim. On the question of costs the case came before Fry J., and is reported in 11 Ch. D. 416. The report states accurately the point involved: "The question thereupon arose whether all the proceedings which related to the plaintiff's claim and the defendant's counterclaim were to be apportioned, or whether the defendant was to pay only so much of the plaintiff's costs as were occasioned by the defendant's counterclaim." The advice of the Taxing Masters was sought, and a very careful report was drawn up by them, and signed by one of them, with the concurrence of the others. The report states:—"I, however, after much consideration, considered that where the plaintiff succeeds in all that he claims, he is, notwithstanding the defendant's success on the counterclaim, entitled to his full costs, except in so far as they are occasioned or increased by the counterclaim; and so, if the plaintiff's action is dismissed with costs, the defendant is entitled to full costs against the plaintiff, except such additional costs as are occasioned by the counterclaim. The plaintiff commences litigation, and it seems to me his costs should depend upon his failure or success. The defendant, under the power given by the Act, superadds a claim of his own, and I think the additional costs occasioned thereby should abide the event. I consulted the Common Law Masters, who agreed in this view, but it is only a matter of opinion, there having been no decisions."

Fry J. lays down the principle thus:—"The proper course will be this: the plaintiff in the original action shall pay the general costs of the action, and the defendant, who is to pay the costs of the counterclaim, shall only pay the costs of the proceedings so far as they have been increased by reason of that counterclaim. The principal reason which leads me to that conclusion is this, that the plaintiff in the original action is the person who first commences litigation. The plaintiff in the action first lets out the waters of litigation, and it is impossible to say how far the counterclaim ever would have been agitated if he had not begun that litigation. That appears to me to furnish a reason why, as a general rule, the action should be treated as if it stood by itself, and the counterclaim should only bear the amount by which the costs of the proceedings are increased by it."

Lord Justice Ronan has been good enough to point out to me that that case, as well as *Mason* v. *Brentini* (2), which I shall next mention, is omitted from the Annual Practice. That appears to be so; but, if so, it is clearly an oversight, and not intentional; the cases are referred

(1) 11 Ch. D 416. (2) 15 Ch. D. 287.

to as good law in Halsbury's Laws of England, vol. 25, title. "Set Off and Counterclaim," at p. 519, the writer of the article adding, in my view rightly: "The costs of the counterclaim are the sum by which the whole costs of the proceedings are increased by reason of the counterclaim." In *Mason* v. *Brentini* (1) the claim and counterclaim were dismissed. The Taxing Master taxed the defendant's costs of the claim to £350, and gave £10 10*s.* to the plaintiff as the costs of the counterclaim. The plaintiff objected, his objection to the taxation and the Taxing Master's ruling being thus stated: "The plaintiff objects for the following reasons to the allowance of the following items:—1. All items in the defendant's bill of costs which relate and are common to the action and counterclaim. (*a*) Because both the action and counterclaim were dismissed and a set off of costs ordered; and although it is admitted that the defendant is entitled to all costs which exclusively relate to the action, and that the plaintiff is entitled to all costs which exclusively relate to the counterclaim, there are numerous charges which do not relate exclusively to one or the other, but which are common to both. All such common charges have been allowed to the defendant by the Taxing Master, whereas it is objected that he is only entitled to be allowed such proportion thereof as the Taxing Master may think, as between action and counterclaim, are fairly attributable to the action in which alone he succeeded." The Court of Appeal (Jessel M.R., James and Brett L.JJ.) emphatically approved of *Saner* v. *Bilton* (2), Jessel M.R., who gave the judgment of the Court, saying:—"I entirely agree with the decision of Mr. Justice Fry in *Saner* v. *Bilton* (2), and for the reasons which he has given; and am of opinion that his judgment is to be considered as expressing the rule of the Court."

Baines v. *Bromley* (3) is a case the actual decision of which does not help so far as what we have to decide in the present case is concerned, for *Baines* v. *Bromley* (3) merely decides the point as to which of the two parties, plaintiff or defendant, was entitled to the costs of a suit where the plaintiff recovered £114 17*s.* 6*d.* for commission due to him by the defendant, and the defendant on his counterclaim recovered £230 0*s.* 9*d.* for goods sold and delivered by him to the plaintiff. The Taxing Master, apparently because more was found due to the defendant than to the plaintiff, taxed the costs on the footing that the defendant was entitled to the general costs of action, in spite of the specific terms of the judgment the other way. It was held that he was wrong. But what we have to decide here is not who is entitled to the costs of the action, but on what principle the defendant's costs of action, to which he is admittedly entitled, and the plaintiffs' costs of counterclaim, to which he is also admittedly entitled, are to be taxed. The case is important for a dictum of Brett L.J.—quite unnecessary for the decision—referred to by Lindley L.J. as misleading, in the passage from *Atlas Metal Co.* v. *Miller* (4), which I have already quoted. This dictum of Brett L.J. I shall return to later on in my judgment.

In *In re Brown*, *Ward* v. *Morse* (5), a railway contractor (or his

(1) 15 Ch. D. 287.
(2) 11 Ch. D. 416.
(3) 6 Q. B. D. 691.
(4) [1898] 2 Q. B. 500.
(5) 23 Ch. D. 377.

Appeal. (*S. I.*) 1921.

CREAN *v.* M'MILLAN.

O'Connor L.J.

representatives) took proceedings against his sub-contractor to recover the amount of an alleged debt, and the sub-contractor rejoined with a counterclaim for damages for breach of contract. The plaintiffs recovered £238 6*s.* 8*d.*, and the sub-contractor recovered £591 2*s.* 2*d.* damages on his counterclaim. The Taxing Master allowed the whole costs of the action to the plaintiff, and to the defendant only his costs of the counterclaim, and taxed the plaintiff's costs to £92 17*s.* 6*d.* and the defendant's costs to £89 18*s.* 3*d.* The defendant objected to the taxation on the ground, in substance, that the items common to claim and counterclaim should be apportioned. Chitty J. states the point at issue thus:—"The point raised is this: the Taxing Master has given to the plaintiffs the whole costs of the action without apportionment, and the substance of the argument on the part of the defendant is that it is a miscarriage on his part, and that the costs ought to be apportioned; that is to say, the common charges in the action, such as term fees, attendances in Court, and the like, ought to be apportioned as between the costs of the action on the one side and the costs of the counterclaim on the other." Chitty J. held that the Taxing Master was right, and, in the course of his judgment, says:—"The plaintiff recovers, as he would before the Judicature Act, the whole costs of the action; but the defendant is put to less costs in regard to his counterclaim, and therefore he has a less demand in respect of the costs of his counterclaim, and in that way, as it appears to me, there is no injustice done to the defendant. He has to incur less costs in his counterclaim by reason of the amended procedure, and consequently, in order to indemnify him against these costs which have been rightly incurred by him, the plaintiff has to pay them; but they are of a less amount than they would have been." This decision was affirmed by the Court of Appeal (Baggallay, Cotton, and Fry L.JJ.), by whom the decisions in *Saner* v. *Bilton* (1) and *Mason* v. *Brentini* (2) were expressly approved.

Shrapnel v. *Laing* (3) is a case like *Baines* v. *Bromley* (4). It merely decides, on the form of a judgment where the plaintiff succeeded on his claim and the defendant on his counterclaim, and the balance was in favour of the defendant, which of the parties was to abide the general costs of the action. In this case Esher M.R. again goes out of his way to express an opinion on the mode of taxation; points which, as Fry L.J. said, did not arise, and upon which it was unnecessary to express any opinion. The dicta of Esher M.R. in this case also I shall consider later on.

In *Atlas Metal Co.* v. *Miller* (5) the plaintiffs brought an action to recover damages for an alleged libel. The defendant pleaded justification, and by a counterclaim sought to recover damages from the plaintiffs for an alleged libel by the plaintiffs on the defendant. Both action and counterclaim were dismissed with costs. The Taxing Master taxed the defendant's costs to £168 13*s.* 9*d.* and the plaintiffs' costs to £180 8*s.* 6*d.* The defendant carried in objections, the material part of which was as follows:—"The Master has taxed the costs of both parties as though there had been two separate

(1) 11 Ch. D. 416.
(2) 15 Ch. D. 287.
(3) [1888] 20 Q. B. D. 334.
(4) 6 Q. B. D. 891.
(5) [1898] 2 Q. B. 500.

and distinct actions, and has allowed attendances on summonses, general attendances, term fees, instructions for brief, fees to counsel thereon, attendances in Court, copies of documents, &c., to both parties, the result being that, although the defendants succeeded, they are deprived of the general costs of the action. The Master considered that he was bound by the decision of *Shrapnel* v. *Laing* (1); but it is respectfully submitted that the case is governed by *Saner* v. *Bilton* (2), and that the defendants are only liable to pay the amount by which the costs have been increased by reason of the said counterclaim, and that they are entitled to the general costs of the cause. The defendants have not set out in detail the items complained of, as, assuming their contention is correct, the bills of costs will practically have to be retaxed, and the defendants object to the general principle on which the costs have been taxed." The Taxing Master replied as follows:—"*Saner* v. *Bilton* (2) does not apply. *Shrapnel* v. *Laing* (1) is a more recent case before the Court of Appeal. The cases are precisely similar. The purpose for which the defendants counterclaimed is immaterial; they have counterclaimed, and the counterclaim is a cross action. For the details of the taxation the Master begs to refer to the bill of costs." It was held that the Taxing Master was wrong. Lindley L.J. deals in turn with the costs of the action and the costs of the counterclaim. In dealing with the costs of the action he says:—"In considering what are costs of the action, the counterclaim, as distinguished from the defence, ought to be disregarded. The costs of the action ought to be taxed as if there were no counterclaim. Whether both parties fail, as in *Saner* v. *Bilton* (2), *Mason* v. *Bretini* (3), and *Russell* v. *Russell* (4), or whether both succeed, as in *Baines* v. *Bromley* (5), *Ward* v. *Morse* (6), *Shrapnel* v. *Laing* (1), and *Hewitt* v. *Blumer* (7), or whether one fails and the other succeeds, can, in principle, make no difference. This was pointed out and decided in *Ward* v. *Morse* (6); and *Baines* v. *Bromley* (5) and *Shrapnel* v. *Laing* (1) in no way conflict with that decision. In *Baines* v. *Bromley* (5) the defendant recovered on his counterclaim more than the plaintiff recovered on his claim; but the order gave the plaintiff the costs of the action, and he was held entitled to them accordingly. No question of apportionment was raised or decided, although Lord Esher in his judgment stated what in his opinion ought to be done as regards items common to both claim and counterclaim. *Shrapnel* v. *Laing* (1) and *Hewitt* v. *Blumer* (7) were precisely similar cases, and are open to precisely similar observations." Then the learned Lord Justice goes on to deal with the action:—"All the authorities agree so far, i.e., they all decide that a plaintiff who is to pay or be paid the costs of his action is to pay or be paid the whole of such costs as if there were no counterclaim. "Next, as to the counterclaim. The defendant has to pay the costs of this; and the counterclaim is to be treated as an independent cause of action, and, to use Lord Esher's words, as if the claim did not exist.

(1) 20 Q. B. D. 334.
(2) 11 Ch. D. 416.
(3) 15 Ch. D. 287.
(4) Unreported.
(5) 6 Q. B. D. 691.
(6) 23 Ch. D. 377.
(7) 3 T. L. R. 221.

Appeal. (*S. I.*) 1921.

CREAN v. M'MILLAN.

O'Connor L.J.

This last expression, however, is calculated to mislead, if not explained and properly understood. What are costs of a counterclaim? The answer must be the costs occasioned by it. No costs not incurred by reason of the counterclaim can be costs of the counterclaim. The fact that if there had been no action, the costs of the counterclaim would have been larger, because the defendant would then have had to issue a writ and take other proceedings, does not make costs not incurred costs incurred; and in considering what the costs of a counterclaim really have been in any particular case, the costs saved by not bringing a cross action cannot be treated as costs incurred. The introduction of counterclaims has given litigants advantages in this respect. Counterclaims, although cross actions for all purposes of procedure and evidence, cost less than actions, and the party who has to pay the costs of a counterclaim gets the benefit of the cheaper procedure. To include in the costs of a counterclaim any costs not occasioned by its being a counterclaim, but saved by its being what it is, appears to us wrong in principle and opposed to *Suner* v. *Bilton* (1) and *Ward* v. *Morse* (2). If Lord Esher really meant to express a contrary opinion, we cannot agree with him. We are satisfied that there is no decision to that effect. But, as pointed out by Lord Esher, there may be costs brought in for taxation which have been incurred partly in support of or in opposition to a defence, and partly in support of or in opposition to a counterclaim, e.g., where there is a defence of set off equal to the plaintiff's demand. In such cases the Taxing Master must apportion the costs as best he can, and fix the amount applicable to the defence and the amount applicable to the counterclaim. Where there are no separate issues requiring special treatment, the costs of the defence will be costs of the action; the costs attributed to the counterclaim will be the costs of the counterclaim. Costs common to both defence and counterclaim must necessarily be dealt with in this way, but to do so is very different from apportioning what are properly costs of the action. Such costs when ascertained must be paid by the party ordered to pay them. They cannot have been increased by the counterclaim, and no part of them can be properly regarded as the costs of the counterclaim. In the present case the Master has lost sight of these principles, and has apportioned some costs which are properly costs of the action, and has thrown some part of them on the defendants. In other instances he has tried to bring about a fair apportionment by equalising the amounts allowed to each party so as to set one off against the other. The result is that the defendants receive less than they ought in respect of the costs of the action, and pay more than they ought in respect of the costs of the counterclaim. The case must, therefore, go back to the Master in order that he may review his taxation in accordance with the principles above explained, and which are in accordance with all the previous decisions when carefully examined."

The last English case to which I shall refer is *Christie* v. *Platt* (3). A landlady sued her tenant for rent of a furnished house. There was no controversy about the contract or the amount of the rent; but the tenant said that it was an implied term of the agreement that the house was reasonably fit for occupation (so far he was clearly right in point of law), and that it was not fit for occupation. The tenant pleaded

(1) 11 Ch. D. 416. (2) 23 Ch. D. 377. (3) [1921] 2 K. B. 17.

these terms by way of defence (which was absurdly wrong), and by way of counterclaim, which was right if the facts bore out the allegations. If ever there was a case in which the action was a small, simple, and cheap business, and the counterclaim a big, difficult, and costly cross action, it was this. Yet, as I have said, he gave £3 for the costs of the counterclaim and £214 for the costs of the action.

The reason, I fancy, that the Taxing Master was misled was the erroneous insertion as a matter of defence of what was a mere matter of counterclaim. Rightly considered, ninety per cent. or more of the brief, for example, must have been taken up with the controverted question of fact—the fitness for occupation—which was, in essence, purely a matter of counterclaim and not of defence at all. And this, I think, is at the basis of the judgment, with which I respectfully agree. But I respectfully fail to agree with some of the obiter dicta in that case, with which I shall deal when speaking later on of the remarks of Esher M.R. in *Baines* v. *Bromley* (1) and in *Shrapnel* v. *Laing* (2).

Now I come to the Irish cases, two of which went to this Court, and are therefore binding on us. In *Duffy* v. *O'Meara* (3)—a case of assault, and counterclaim for assault, arising out of the same transaction—it was held by O'Brien J. that where a plaintiff or defendant succeeds in the original action, and fails on the counterclaim, the successful party is entitled to the full costs of the action, as if there had been no counterclaim, save only such costs as were occasioned exclusively by the counterclaim, thus affirming the principle laid down by *Saner* v. *Bilton* (4), *Mason* v. *Brentini* (5), and *Atlas Metal Co.* v. *Miller* (6).

The principle of that case came before the Court of Appeal in 1903 (12th February) in *Coulter* v. *Crangle* (7). As appears from the Registrar's note, the action was by a servant against a personal representative of his late master to recover £119 for cash lent; there was a counterclaim for an account. The jury found for the defendant on the claim, and for the plaintiff on the counterclaim. The Taxing Master allowed to the defendant all the items at all referable to the original action, although they were also referable to the counterclaim, and as a result the defendant's costs of action were taxed to £85 9*s.* 5*d.*, and the plaintiff's costs of counterclaim to £13 2*s.* 9*d.* The plaintiff went to the King's Bench Division, where an order was made that the ruling of the Taxing Master be affirmed, "the Court considering that they were bound to follow the decision of the Court in the case of *Duffy* v. *O'Meara* (3)."

The plaintiff appealed and submitted that *Duffy* v. *O'Meara* (3) was not good law. The Lord Chancellor said:—"The claim and counterclaim are practically the same action—a variation of pleadings, but one action. The jury found on the broad question for defendant, and on the counterclaim for plaintiff for £13 12*s.* 9*d.* It was contended on taxation that the Taxing Master must regard these as two totally distinct actions in water-tight compartments. The Taxing Master

(1) 6 Q. B. D. 695.
(2) [1888] 20 Q. B. D. 334.
(3) [1899] 5 I. W. L. R. 147.
(4) 11 Ch. D. 416.
(5) 15 Ch. D. 287.
(6) [1898] 2 Q. B. 500.
(7) 3 N. I. J. R. 158.

Appeal. (*S. I.*) 1921.

CREAN *v.* M'MILLAN.

O'Connor L.J.

overruled plaintiff's objections. He says, 'I think the defendant having succeeded in getting the verdict in the original action is entitled to all costs except the few small items in respect of the counterclaim, which I have allowed to plaintiff and disallowed to defendant.' I think that is overwhelming commonsense and law. I am satisfied to take the case which the King's Bench Division thought was binding on them: *Duffy* v. *O'Meara* (1). I see nothing to induce me to qualify it; and I am clearly of opinion the ruling of the Taxing Master and the decision of the King's Bench Division were correct." FitzGibbon L.J. said:—"I think the principle as stated by O'Brien J. in *Duffy* v. *O'Meara* (1) (p. 150) is clear and right. When an action is brought by a plaintiff who fails, and when he ought to indemnify the defendant, the amount of the indemnity cannot be lessened by anything defendant does by way of defending himself. He is entitled to all costs to which he was put by the unfounded action. The counterclaim comes in by way of set-off. It arises from the form of defendant's pleading, having made the form of the suit taken by plaintiff more expensive than it would otherwise have been. Where the counterclaim is an independent action, plaintiff is entitled to be indemnified against costs. But in the present case the counterclaim is really a defence in disguise. The only additional expenses occasioned by the counterclaim would be any additional fees of counsel, or for scrivenery connected with it. Plaintiff must pay all the expenses of the action as if there had been no counterclaim." Holmes L.J. said:—"I agree with the passage in O'Brien's J. judgment, which lays down the correct rule. Quite apart from that judgment, I should have no hesitation in holding the decision below was correct. This is not the ordinary case of a counterclaim at all, but a form of defence. It became unnecessary to take an account, because it had already been taken in testator's lifetime."

That case, as well as the case of *Duffy* v. *O'Meara* (1), which was expressly approved of, seems to me to be absolutely in point here. For in this case, as I have pointed out, the issue in controversy was, were the goods sold and delivered within the stipulated time? and a finding on that issue was common to both the action and the counterclaim. To the same effect is the decision of the King's Bench Division (Palles C.B., Madden and Kenny JJ.) in *Samuel* v. *Burnham* (2). The plaintiff, a money-lender, sued the defendant for cash lent, and the defendant counterclaimed to have the transaction reopened as harsh and unconscionable. Judgment was given for the plaintiff for £183 over and above the amount lodged in Court, and for the defendant on his counterclaim with costs. It was held that the plaintiff was entitled in full to the costs of evidence of witnesses whose evidence was common to both issues.

The authority of *Duffy* v. *O'Meara* (1), *Coulter* v. *Crangle* (3), and *Samuel* v. *Burnham* (2) is in nowise weakened by the last Irish case, *National Gas Engine Co.* v. *Dolphin's Barn Brick Co.* (4); on the contrary, this case merely illustrates the working of Lord Lindley's rule when applied to a case in which the items exclusively attributable to the counterclaim are substantial. The action was to recover the

(1) [1899] 5 I. W. L. R. 147.
(2) 42 I. L. T. R. 24.
(3) 3 N. I. J. R. 158.
(4) 44 I. L. T. R. 248.

price of a gas-engine, which was actually sold and delivered to and accepted by the defendants. The defendants pleaded, by way of defence, that the gas-engine was defective; they counterclaimed for damages for breach of warranty. The action, after being several days at hearing, was referred to an arbitrator. It took a very considerable time before him, and he found for the plaintiffs on the claim, and for the defendants on the breach of warranty. The Taxing Master, in taxing the costs, gave no sufficient weight to the fact that the costs had been increased, and greatly increased, by the counterclaim. For example, the arbitrator was engaged for a very considerable portion of his time in trying the counterclaim; yet the Taxing Master gave all his fees to the plaintiff, and so of other "partially common" items. This was held to be wrong by the King's Bench Division and the Court of Appeal. Again, I respectfully agree; the case was on all fours with *Christie* v. *Platt* (1).

I have already intimated that there are expressions in the judgments in some of the cases that I deem either misleading or erroneous. In *Baines* v. *Bromley* (2) Brett L.J. said (at p. 695):—"I have, however, a firm opinion that where there is a claim with issues taken on it and a counterclaim, not a set off, but in the nature of a cross action with issues on it, and where the plaintiff succeeds on the claim and the defendant on the counterclaim, the proper principle of taxation, if not otherwise ordered, is to take the claim as if it and its issues were an action, and then to take the counterclaim and its issues as if it were an action, and then to give the allocatur for costs for the balance in favour of the litigant in whose favour the balance turns. In such a case, where items are common to both actions, the Master would divide them. Where the so-called counterclaim is a set off, there is but one action."

The same learned Judge (then Lord Esher M.R.), following the same line of thought in *Shrapnel* v. *Laing* (3), says:—"The meaning of the expression 'common items' is, items in respect of which both parties get the advantage. There must be very few of such items; it may be doubted whether there are more than two. Perhaps the costs of the writ by which the plaintiff commences his action, and by means of which the defendant is enabled to set up his counterclaim, ought so to be divided, and it may be that whichever party turns out to be in the wrong he ought only to pay half the costs of the writ. It is suggested, too, that the same principle may apply to a summons for interrogatories."

His dictum in *Baines* v. *Bromley* (2) is unfavourably noticed by Chitty J. in *In re Brown* (4), but is repeated by Baggallay L.J. without disapproval in the same case (5). This mention, however, must have been per incuriam, for the actual decision in *In re Brown, Ward* v. *Morse* (4), to which Baggallay L.J. was a party, is absolutely inconsistent with the dictum.

Lord Esher's dictum in *Baines* v. *Bromley* (2) is also unfavourably criticized by Lord Lindley in the *Atlas Metal Co.* v. *Miller* (6) in the passage I quoted at the beginning of my judgment. It is cited with

(1) [1921] 2 K. B. 17.
(2) 6 Q. B. D. 691.
(3) 20 Q. B. D., at p. 339.
(4) 23 Ch. D., at p. 382.
(5) 23 Ch. D., at p. 385.
(6) [1898] 2 Q. B. at p. 505.

Appeal. (*S. I.*) 1921.

CREAN v. M'MILLAN.

O'Connor L.J.

approval by Atkin L.J. in *Christie* v. *Pratt* (1). In *Christie* v. *Pratt* (1), Younger L.J. (at pp. 29 and 30) says:—"I agree so completely that I refrain from adding anything which might be taken to modify what Atkin L.J. has said. The Taxing Master has gone wrong in assuming that the effect of an order that the plaintiff shall recover on the claim with costs, and an order that the defendant shall recover on the counterclaim with costs, is to give the plaintiff such a position of priority that the taxation of the two sets of costs must be on wholly different principles."

Let me say, with profound respect for the memory of a very eminent Judge, that Lord Esher fell into obvious error when he speaks in *Shrapnel* v. *Laing* (2) of the common items being very few, "it may be doubted whether they are more than two." I ventured to analyse earlier in my judgment the various items making up a bill of costs. As I pointed out, there are many items, all of which are common; there are many other items, the great part of which is common. Lord Esher goes on to say perhaps the costs of the writ should also be split up. There is no authority for such a proposition; indeed it is contrary to Lord Esher's decision in *Mason* v. *Brentini* (3). It is true that the writ (and many other items) carry the counterclaim to trial as well as the action, but because they carry the action to trial that is the very reason why they are costs of the action and not costs of the counterclaim, though they carry that to trial as well.

Now I come to Lord Esher's dictum in *Baines* v. *Bromley* (4). He says:—"The proper principle is to take the claim as if it and its issues were an action, and then to take the counterclaim and its issues as if it were an action," and tax accordingly. What is the meaning of that? Let me take a case where there is an action for negligence, and a counterclaim for negligence arising out of the same transaction, and both claim and counterclaim are dismissed. The defendant's costs of action are first taxed. Ninety-five per cent. of the brief is taken up with matter that affords a defence to the action, though it is equally relevant to the counterclaim. Shutting his eyes to the existence of the counterclaim, the Taxing Master gives the entire brief and practically all (if not all) the fees to the defendant as costs of the action. The Taxing Master now comes to tax the plaintiff's costs of counterclaim. Shutting his eyes to the existence of the action, he finds that ninety-five per cent. of the costs are conversant with the happening of the accident, and therefore attributable to the counterclaim, and he allows practically all the plaintiff's brief and fees to the counterclaim. If this system is adopted, the plaintiff's costs in such a case will equal if they do not amount to more than the defendant's, though it is the plaintiff who, in the words of Lord Lindley, has let loose the waters of litigation. In my view the Taxing Master should have found by what amount plaintiff's costs were increased by the counterclaim; he would then allow him, not ninety-five per cent. of the brief, but five per cent. Lord Esher's dictum is in the teeth of the decision in *Mason* v. *Brentini* (3), to which he was a party; in that case he approved of the Taxing Master's decision giving the defendant £350 costs of the claim, and to the defendant £10 costs in the counterclaim. The actual

(1) [1921] 2 K. B., at p. 27.
(2) [1888] 20 Q. B. D. 335.
(3) 15 Ch. D. 287.
(4) 6 Q. B. D., at p. 695.

decisions seem to me to establish that an item which is purely common goes entirely to the costs of the action; an item which is mixed should go, so far as it is common, to the costs of the action; and where the item is in its nature not capable of actual segregation, such as a brief fee, it may be apportioned in the discretion of the Taxing Master. If my opinion on this point differs from that of Younger L.J. when he says there is to be no priority between action and counterclaim, I respectfully think that the weight of authority is in favour of the views I have tried to express.

For these reasons I am of opinion that to award the plaintiffs in this case, who, as their own documents prove, litigated the case substantially as if there were no counterclaim at all, substantial costs of a counterclaim is unjust, and contrary to precedent and authority. I think the Taxing Master was right, and I agree with the King's Bench Division that the appeal should be dismissed.

R. ST. J. C.

1922. Feb. 7, 8, 24.

The plaintiffs appealed to the High Court of Appeal for Ireland (1).

Dickie K.C. and *Devitt* (with them *Lardner K.C.*), for the appellants:—

Where there are a claim and a counterclaim and each person has won, the proper method of taxation is to allow all costs relating exclusively to the claim to the person who has succeeded on the claim, to allow all costs relating exclusively to the counterclaim to the person who has succeeded on the counterclaim, and to apportion among the parties all common costs. A counterclaim was not an issue, but a separate cause of action—a cross action: see Order 19, rule 3. The whole case depends upon the meaning of *Atlas Metal Co.* v. *Miller* (2), applied and considered in *Fox* v. *Central Silkstone Collieries* (3) and *Christie* v. *Platt* (4). The principle on which costs should be taxed in a case like this is stated in *Fox* v. *Central Silkstone Collieries, Ltd.* (3), by Ridley J. as follows:—"According to the principles laid down in *Shrapnel* v. *Laing* (5) and *Atlas Metal Co.* v. *Miller* (2) for the purposes of taxation, a counterclaim is to be treated as an independent cause of action; and it may be therefore that in a particular case it would be quite proper to allow the maximum brief fee of three guineas in respect of a successful claim, and also in respect of a successful counterclaim. But there is another principle which has to be borne in mind, and that is that if the work in respect of which the fee has been paid relates both to the claim and the counterclaim, the fee must be apportioned between the two; and in the case of a plaintiff who has succeeded on the claim and failed on the counterclaim, only so much of the brief fee as is apportioned to the claim ought to be allowed on taxation of

(1) In the High Court of Appeal for Ireland, before SIR JOHN ROSS C., O'CONNOR M.R., and ANDREWS L.J.

(2) [1898] 2 Q. B. 500
(3) [1912] 2 K. B. 597.
(4) [1921] 2 K. B. 17.
(5) 20 Q. B. D. 334.

High Court of Appeal. 1922.

CREAN v. M'MILLAN.

the costs of the claim. The same principle applies to the taxation of the costs of the counterclaim, where the defendant has succeeded on the counterclaim but failed in his defence to the claim."

In *Saner* v. *Bilton* (1) it was held that where the plaintiff's claim and defendant's counterclaim were both dismissed with costs the plaintiff was to pay to the defendant the general costs of the action, and the defendant was to pay to the plaintiff only the amount by which the costs had been increased by reason of the counterclaim. In *In re Brown* (2), Baggallay L.J. said—"It appears to me that the principle of *Saner* v. *Bilton* (1), although that was a case where both parties failed, should be equally applicable to a case where both parties have succeeded. The plaintiff should recover from the defendant the costs of the action except so far as they are attributable to the counterclaim, and the defendant should recover from the plaintiff the costs of the counterclaim. If there are any costs which can be properly considered common to both sides, e.g. a brief fee if there is only one brief both on the claim or counterclaim, or the fees of assessors, or those on a reference, or other items which can be fairly considered to be common to both proceedings, they should be divided." Subject to that qualification, he approved of *Saner* v. *Bilton* (1); and in *Christie* v. *Platt* (3) Atkin L.J. quoted the foregoing passage from the judgment of Baggallay L.J. with approval. [They also referred to *Jones* v. *Stott* (4) and *James* v. *Jackson* (5).]

The English authorities support the proposition for which we contend; and the question is whether there is any difference between the practice here and in England. Are the Courts here bound by the decision in *Duffy* v. *O'Meara* (6)? That case misconceived the effect of the decision in *Atlas Metal Co.* v. *Miller* (7). We submit that *Duffy* v. *O'Meara* (6) was in effect overruled by *National Gas Engine Co.* v. *Dolphin's Barn Brick Co.* (8). [Other authorities referred to: *Griffiths* v. *Patterson* (9), *Coulter* v. *Crangle* (10), *Henderson* v. *M'Tear* (11), *Kennedy* v. *Healy* (12).]

Serjeant Hanna and *H. D. Conner K.C.* (with them *A. W. Burke*), for the respondent:—

Wherever a separate and substantial question is raised by a counterclaim involving issues different from those raised in the action, whoever wins in the counterclaim must necessarily be awarded the costs occasioned by it. What the Court has to look at is substance and not form. Here the whole case was decided in the action. In *Duffy* v. *O'Meara* (6) there was in form a true counterclaim, yet as the subject-matter of the counterclaim was the same as that in the action, it was held that the proper way of taxing the costs of the action was to allow the person who succeeded in the counterclaim the costs occasioned by the counterclaim. In *Forrest* v. *Carte* (13) Holmes J.

(1) 11 Ch. Div. 416.
(2) 23 Ch. Div. 377.
(3) [1921] 2 K. B. 17.
(4) [1910] 1 K. B. 893.
(5) [1910] 2 Ch. 92.
(6) 5 I. W. L. R. 147.
(7) [1898] 2 Q. B. 500.
(8) 44 I. L. T. R. 248.
(9) 22 L. R. Ir. 656.
(10) 3 N. I. J. R. 158.
(11) [1906] 2 I. R. 526.
(12) [1897] 2 I. R. 258, 270.
(13) [1897] 2 I. R., at p. 324.

says:—"Since the Judicature Act apportionment is necessary where a defendant succeeds on a true counterclaim, but in all other respects the law, I believe, remains unaltered. The technical issues of the Common Law Procedure Act have disappeared, and in carrying out the present rule that the costs of every action, question, and issue shall follow the event, it is necessary to ascertain what have been the substantial matters in controversy between the parties." Order XIX, rule 3, deals with remedies and not with costs.

Although the issue raised by the counterclaim was the same as that raised by the defence, the appellants' claim is that a nominal judgment for them entitles them to the costs of a cross action. In *Atlas Metal Co.* v. *Miller* (1), Lindley M.R. says:—"No costs not incurred by reason of the counterclaim can be costs of the counterclaim." Where the defendant succeeds on the original action, and the plaintiff on the counterclaim, the defendant is entitled to the full costs of the action as if there was no counterclaim, and the plaintiff is entitled to such costs only as were occasioned by the counterclaim: *Coulter* v. *Crangle* (2).

An item is not common unless it is occasioned by the counterclaim. When in reality there is only one subject-matter, covered by claim and defence, there can be no common items. If the plaintiffs had won the claim and counterclaim, would they be entitled to two sets of costs?

The order in the *National Gas Engine Co.* v. *Dolphin's Barn Brick Co.* (3) was a special order, and was not of any general application.

Dickie, in reply.

Feb. 28.

SIR JOHN ROSS C.:—

This action was brought to recover damages for breach of a written contract dated 26th July, 1918, wherein the plaintiffs agreed to sell and deliver to the defendant, and the defendant agreed to buy certain goods at the price therein mentioned, the delivery being by weekly or monthly deliveries up to the end of October, 1918. Portion of the goods were delivered and paid for, but the defendant refused to take the remainder, on the ground that the goods had not been sent or tendered to him within the stipulated time. The plaintiffs claimed £89 12*s.* 5*d.*, the price for goods tendered and refused, and £346 3*s.* for damages for breach of contract, representing the loss on resale of the remainder of the goods.

The defence pleaded was that the goods were not sent or tendered within the agreed time, and that the defendant cancelled the contract. The defendant counterclaimed for £57 12*s.* 8*d.* damages for loss incurred by reason of the plaintiffs' failure to deliver the goods within the stipulated time.

The action was tried by Mr. Justice Gordon without a jury, and the result was that the plaintiffs' claim was dismissed with costs, and the defendant's counterclaim was also dismissed with costs.

It is of importance to observe that the issue raised by the defence is precisely the same as the issue raised by the counterclaim.

(1) [1898] 2 Q.B. 500. (2) 3 N.I.J.R. 158. (3) 44 I.L.T.R. 248.

High Court of Appeal. 1922.

CREAN v. M'MILLAN.

Sir J. Ross C.

The Taxing Master certifies that he taxed the costs of the defendant as if there had been no counterclaim, giving him the general costs of the action, but deducting any costs that were incurred solely by reason of and attributable to the counterclaim; further, that he taxed the costs of the plaintiffs, giving them only such costs as were incurred solely by reason of and attributable to the counterclaim; and he allowed them none of the costs incurred in the action that would have been incurred if there were no counterclaim. The Taxing Master states that he was of opinion that the counsels' fees were not incurred by reason of the counterclaim. He awarded £5 only as the plaintiffs' costs of the counterclaim, and from this we may infer that, in his opinion, which I assume to be correct, the costs of the action were not materially increased by the existence of the counterclaim.

It is now contended by the plaintiffs that the principle of taxation is wrong, and that the Master should have apportioned the charges in both bills, which were common to the original action and the counterclaim, and that the plaintiffs are entitled to the general costs of the counterclaim. At first sight this would appear to be a very simple matter. We may deal with the matter as if the case had been tried by a jury.

Under General Order 65 the costs of every action, question, and issue tried by a jury shall follow the event; and under rule 11, when issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event. The word "event" means the result of the litigation, and it is plain that it must be read distributively. It is for the Taxing Master to ascertain what are the issues in the litigation, and to give the costs in accordance with the determination of such issue. Here the particular issue with which we are concerned, that the goods were not sent within the stipulated time, arises for the first time in the defence; the issue is decided against the plaintiffs, and the Master directs the costs to follow the event.

But it is put forward again by the defendant in his counterclaim; the evidence is the same; the argument is the same; there is only superadded a claim for damages, and this fails. The Master finds that the repetition of this in the counterclaim does not substantially add to the costs either in respect of the counsels' fees, or in any other respect, and allows a sum of £5 in respect of it.

It is the duty of this Court to settle matters of principle to be applied in the taxation of costs. But in the case of an appeal I do not think it wise to travel very far outside the borders of the case in hand. I think we should declare the principles in so far as they affect the case before us, and not attempt to lay down principles for all cases.

The cardinal point in this case is that the facts on which the defendant succeeded in the defence were identical with those put forward in the counterclaim. No doubt the claim for damages founded thereon, for some reason that is not clear to me, failed and costs were given in respect thereof against the defendant.

Is there any reason in law or in commonsense why the defendant should be penalized unduly because he seeks to utilize facts already proved and arguments already put forward in the defence, merely because he fails to recover damages in respect thereof?

In dealing with costs, in strict justice it would appear that each party should pay the costs of the matter in which he fails. But it is impossible to carry this out exactly in practice. The case is dealt with by issues, and in each issue on which a party wins there may be much that has not conduced to his success in the issue, and yet he gets substantially the costs of the issue. Rules for taxation must be adopted which are necessarily rough rules. A Court may, in certain cases, give special directions varying the rules. It may direct, for instance, that the expenses of witnesses be disallowed to a successful party, but, subject to this, there must be definite rules. Taxing Masters cannot be expected to understand the mass of decisions cited to us in this case.

This very question came up before Mr. Justice Fry in 1879 in *Saner* v. *Bilton* (1). Having asked the advice of the Taxing Master, he decided, in the clearest words, that where the plaintiff's claim and the defendant's counterclaim were both dismissed with costs, the general costs of the proceedings were not to be apportioned, and that the plaintiff was to pay to the defendant the general costs of the action, and that the defendant was to pay to the plaintiff only the amount by which the costs have been increased by reason of the counterclaim.

That rule is clear and simple, and has been acted on for more than forty years in this country. A settled practice should not be departed from unless for overwhelming reasons. It is contended that the decision is obsolete, and is inconsistent with the principle laid down by Lindley M.R. in the *Atlas Metal Co.* v. *Miller* (2). I fail to see any inconsistency; on the contrary, if words mean anything, Lindley M.R. approves of it. He says:—"To include in the costs of a counterclaim any costs not occasioned by its being a counterclaim, but saved by its being what it is, appears to us wrong in principle, and opposed to *Saner* v. *Bilton*" (1).

The same principle was applied in *Ward* v. *Morse* (3), when the plaintiff's claim and the defendant's counterclaim were both successful. In that case an observation was made by Baggallay L.J. (p. 386) which has been much pressed here. Even if approved by the other members of the Court, I cannot see how it affects this case.

In *Mason* v. *Brentini* (4) all the points made here were unsuccessfully urged, but the Court, consisting of Jessell M.R., James and Brett L.JJ., affirmed Mr. Justice Fry's judgment in *Saner* v. *Bilton* (1) without qualification.

We do not derive much assistance from the English cases, where the causes of action in the claim and counterclaim are quite distinct and independent. They are practically actions and cross actions tried together. The observations of the Judges applied to them are not very helpful when applied to a case like this, where the very same matter pleaded successfully by way of defence is pleaded by way of counterclaim.

We now come to the Irish cases. In *Duffy* v. *O'Meara* (5)—a claim for assault and counterclaim for assault arising out of the same transaction—O'Brien J. applied the principle laid down in *Saner* v. *Bilton* (1).

(1) 11 Ch. D. 416.
(2) [1898] 2 Q. B. 500, at p. 506.
(3) L. R. 23 Ch. D. 377.
(4) 15 Ch. D. 287.
(5) 5 I. W. L. R. 147.

High Court of Appeal. 1922.

CREAN v. M'MILLAN.

Sir J. Ross C.

The principle of that case was considered by the Court of Appeal in *Coulter* v. *Crangle* (1). A servant sued his master's personal representative for money lent; there was a counterclaim for an account. The jury found for the defendant on the claim, and for the plaintiff on the counterclaim. The King's Bench Division followed *Duffy* v. *O'Meara* (2). The Lord Chancellor says the claim and the counterclaim are but one action, and approved of the defendant getting all the costs except the few small items in respect of the counterclaim. FitzGibbon L.J. says: "Where the counterclaim is an independent action, plaintiff is entitled to be indemnified against all costs, but in the present case the counterclaim is really a defence in disguise." Holmes L.J. says: "This is not the ordinary case of a counterclaim at all, but a form of defence."

In *Forrest* v. *Carte* (3), Holmes J. says: "Apportionment is necessary where a defendant succeeds on a true counterclaim." In these last two cases we get to the root of the matter, and are able to get a principle that will guide the Taxing Master. Wherever there is a separate and substantial question raised by the counterclaim, there must be substantial costs paid in relation to the counterclaim, and it follows that there must be an apportionment of the costs. But, on the other hand, where the subject-matter of the counterclaim is identical with the defence or part of the defence, in that case the Taxing Master should not apportion, but simply allow such extra costs as have been incurred by reason of the counterclaim. This view seems to me to be the foundation of the decision in *Christie* v. *Platt* (4), and is consistent with almost all the decisions in England or here. I do not say that it quite agrees with all the language used by the learned Judges in arriving at these dicisions.

As far as the present case is concerned, to allow substantial costs to the plaintiffs, who from start to finish conducted the case as if there were no counterclaim at all, would be the height of injustice and a reversal of the practice that has prevailed since the Judicature Act was passed.

I agree with the view taken by O'Connor L.J., and in substance with his reasons so accurately and elaborately given. The appeal must be dismissed with costs.

O'CONNOR M.R.:—

The decisions upon the taxation of costs in actions in which there are claims and counterclaims have been so frequently reviewed that I do not think it necessary to go through them seriatim. They seem to me to establish general principles which are applicable to the present case, and to supply the means of arriving at a correct conclusion on this appeal.

The first rule to be observed is that, in taxing the costs of the original action, the counterclaim—that is, a counterclaim properly so called and not a set off—is to be disregarded. The next rule is that in taxing the costs of a counterclaim it is to be treated as an independent cause of action and as if the claim did not exist: *Atlas Metal Co.* v. *Miller* (5).

(1) 3 N.I.J.R. 158. Registrar's Note, 1903.
(2) 5 I.W.L.R. 147.
(3) [1897] I.R., at p. 324.
(4) [1921] 2 K.B.D. 17.
(5) [1898] 2 Q.B. 500.

These rules are, however, to be cautiously applied for the purpose of ascertaining what are really costs of the action—that is, the costs of the claim and the defences to the claim, whether by way of traverse or set off or other special defence properly so called. In like manner, the actual costs of the counterclaim are to be determined. For instance, counsel's brief for the plaintiff may be of a composite character. It may consist in part of material for the purpose of proving the claim and meeting the defence or defences properly so called, and in part of material for the purpose of meeting a counterclaim. Indeed, in some cases an inconsiderable portion of the brief may only relate to the claim, while the bulk may relate to the counterclaim. In such cases it would be manifestly wrong to attribute all the costs of the brief to the original action, because the entire costs would not really be costs of the action.

In such cases, too, the fees to plaintiff's counsel would properly be increased, having regard to the extra work and time required for mastering such part of the brief as relates solely to the counterclaim, and it would be wrong to attribute the whole fee to costs in the original action.

For the ascertainment, therefore, of the costs properly attributable to claim and counterclaim respectively there must in many cases be an apportionment between each set of costs, of items of expenditure, which may be aptly described as common items. This, I apprehend, is what Lindley L.J. refers to in *Atlas Metal Co.* v. *Miller* (1) when he refers to an apportionment which must be made by the Taxing Master as best he can.

According to one of the rules I have mentioned, the costs of the counterclaim are to be taxed as if it were an independent action; but this again must be applied with the object of ascertaining the real costs of the counterclaim and not costs not actually incurred. A counterclaim is in a sense an independent action, but much of the costs which would have been incurred if an original action were brought by the defendant are saved to him by the adoption of the procedure by way of counterclaim; and, as Lindley L.J. has happily pointed out, costs saved are not costs incurred, and ought not to be found in the bill.

The latest decision on the matter is to be found in *Christie* v. *Platt* (2), in which Atkin L.J. reviewed the previous cases. As I understand his judgment, it by no means differs from that of Lindley L.J. in *Atlas Metal Co.* v. *Miller* (1). It confirms it, and explains that what the Master has to do in the application of the rules laid down is to find out what costs have in truth and in fact been incurred by the plaintiff in bringing and prosecuting the action, and what costs have in truth and in fact been incurred by the counterclaim. The taxation in that case was set aside because no consideration was given to this question.

Now, I am satisfied that in the present case substantially all the costs actually incurred are attributable to the original claim, and an infinitesimal part is attributable to the counterclaim. O'Connor L.J. has well pointed out that in the case for proofs there is not a single reference to the counterclaim. The same observation applies to the

(1) [1898] 2 Q.B. 500. (2) [1921] 2 K.B. 17.

High Court of Appeal. 1922.

CREAN v. M'MILLAN.

direction of proofs by plaintiff's counsel. I cannot imagine any more convincing evidence that the plaintiff prepared his briefs, measured his fees, and did every substantial piece of work with reference to the claim and the claim only. This was evidently the view which the Taxing Master took when he attributed almost the whole costs to the action, and only a nominal sum to cover special items to the counterclaim.

Forming my judgment on the principles I have referred to, I see no reasons for disturbing the taxation, and I agree that the appeal should be dismissed.

ANDREWS L.J.:—

In the judgment which he has just delivered, the Lord Chancellor has clearly stated the questions involved in this appeal. Expressed in the briefest possible terms, the issue really is whether in the taxation of the costs the counterclaim in this case should be treated as a separate cause of action, or merely as a separate issue.

Having regard to certain observations which fell from Mr. Dickie towards the close of his argument on behalf of the plaintiffs in reference to the allowances which the Taxing Master has made to the defendant in respect of the attendance of certain witnesses who, he alleges, were called by the defendant in support of the counterclaim upon which he failed, I desire to make it clear that we are concerned in this appeal only with a consideration of the principle applicable to the case, and not with the manner in which that principle has been applied to particular items in the bill of costs. If an error has been committed in the application of the principle, regarding which I refrain from expressing any opinion whatever, it must be rectified, if it is still possible to do so, by separate motion for that purpose.

Having regard to the very exhaustive review of the authorities by O'Connor L.J., and to the judgments of my colleagues, I propose to make but a brief reference to the principal authorities, and to state as clearly and concisely as I can the general trend of authority in England and Ireland, and the conclusions at which I have arrived in reference to the true principles upon which the Taxing Master should proceed in taxing costs in cases of this character.

In his well-known judgment in *Duffy* v. *O'Meara* (1), which has been frequently affirmed by our Courts, O'Brien J. points out that for some time after the passing of the Judicature Act the Courts in Ireland had given fuller and greater effect to the section of that Act which declared that a counterclaim should be treated as a cross action, and, accordingly, on taxation a counterclaim was treated in every respect as a cross action, leading, as in *Griffiths* v. *Patterson* (2), to a division of certain common items. In time, however, this system of division of common items was varied or modified under the influence, no doubt, of several important English decisions, of which *Saner* v. *Bilton* (3) may be selected as an illustration. In that case the plaintiff had demised certain premises to the defendant which were used by him as a store. The plaintiff claimed damages for injury to the buildings, caused, as he alleged, by excessive and improper storage of goods

(1) [1899] 5 I. W. L. R. 147. (2) 22 L. R. Ir. 656. (3) 11 Ch. D. 416.

therein by the defendant. The defendant in his counterclaim alleged that at the time of the granting of the lease the buildings were represented by the plaintiff to be of sound construction and fit for use as a warehouse, whereas they were in fact of faulty construction, and he claimed an abatement of rent and damages for breach of the plaintiff's covenant to keep the main walls in good repair and condition. Both claim and counterclaim were dismissed with costs, and it was held by Fry J. that the plaintiff must pay to the defendant the general costs of the action, whilst the defendant should pay to the plaintiff only the amount by which the costs were increased by reason of the counterclaim. In his judgment (at p. 419) he states that the principal reason which led him to that conclusion was that the plaintiff in the original action was the person who first commenced litigation; it was the plaintiff who first let out the waters of litigation; and it was impossible to say how far the counterclaim ever would have been agitated if he had not begun the litigation. This, he considered, furnished a reason why, *as a general rule* (the italics are mine), the action should be treated as if it stood by itself, and the counterclaim should only bear the amount by which the costs of the proceedings are increased by it.

Now, is *Saner* v. *Bilton* (1) still good law? For, if it is, it appears to me to govern the present case. I have searched through all the authorities relied upon by Mr. Dickie, but have failed to find in any of them that it has ever been overruled or disapproved of. On the contrary, it has been approved of by the Court of Appeal in England in *Mason* v. *Brentini* (2), *In re Brown*, *Ward* v. *Morse* (3), and *Atlas Metal Co.* v. *Miller* (4); and its principle has been acted upon by our Irish Court of Appeal in *Coulter* v. *Crangle* (5), of which the best report is to be found in the Registrar's Book, and by our King's Bench Division in *Forrest* v. *Carte* (6) and *Samuel* v. *Burnham & Tighe* (7).

It is urged, however, on behalf of the plaintiffs that the authority of these cases is somewhat shaken by the more recent Irish case of *National Gas Engine Co.* v. *Dolphin's Barn Brick Co.* (8), and by the English cases of *James* v. *Jackson* (9), *Fox* v. *Central Silkstone Collieries, Ltd.* (10), and *Christie* v. *Platt* (11). In my opinion, however, they do not affect the authority of the decisions commencing with *Saner* v. *Bilton* (1) to which I have referred. They only illustrate the difficulty, which I think was fully appreciated by Fry J. in *Saner* v. *Bilton* (1), in the words which I have italicised, of laying down an inflexible rule which must apply in the taxation of the costs of all claims and counterclaims. Thus, the decision in the *National Gas Engine Co.* v. *Dolphin's Barn Brick Co.* (8) rested entirely upon the special order settled by Andrews J. when directing the form of judgment to be entered on the claim and counterclaim based on the findings of the arbitrator, some of which findings were in favour of the plaintiffs, whilst others, on distinct issues of fact, were in favour of the defendants. Sir Samuel Walker, Bart., C., concludes his judgment by

(1) 11 Ch. D. 416.
(2) 15 Ch. D. 287.
(3) 23 Ch. D. 377.
(4) [1898] 2 Q. B. 500.
(5) 3 N. I. J. R. 158.
(6) [1897] 2 I. R. 314.
(7) 42 I. L. T. R. 24.
(8) 44 I. L. T. R. 248.
(9) [1910] 2 Ch. 92.
(10) [1912] 2 K. B. 597.
(11) [1921] 2 K. B. 17.

High Court of Appeal. 1922.

CREAN v. M'MILLAN.

Andrews L.J.

stating that in the order which the Court made there was nothing contrary to the principles laid down in *Atlas Metal Co.* v. *Miller* (1).

Turning then to the recent English cases referred to, *James* v. *Jackson* (2) may be dismissed by saying that the sole question in issue was as to the proper form of order. The case did not decide anything as regards the principle of taxation, though I may add that it is not difficult to read in the judgment of Warrington J. a tacit approval of the principle underlying *Saner* v. *Bilton* (3). In *Fox* v. *Central Silkstone Collieries, Ltd.* (4), the King's Bench Division held that the fact that the maximum brief fee had been allowed in respect of the claim did not prevent the allowance of a brief fee for the counterclaim, and that, if only one fee was paid, it must be apportioned between the claim and the counterclaim, on the ground that the work in respect of which the fee is paid relates to both the claim and the counterclaim. In this case, however, it is to be observed that there was no connexion, so far as appears by the report, between the plaintiff's claim for arrears of salary and the defendant's counterclaim for the return of certain traders' railway contracts. At any rate, it may safely be said that the issues raised in the claim and counterclaim were wholly separate and distinct. In other words, there was separate work done in respect of claim and counterclaim; and, as the fee on the brief was presumably given to cover all the work, it was reasonable that it should be apportioned.

Christie v. *Platt* (5) only illustrates the absurdity of trying to lay down any one rule which must govern all cases. There the plaintiff sued for £200 rent, and the defendant pleaded that the demised premises were uninhabitable, also counterclaiming for damages in respect of the plaintiff's breach of the implied term of the tenancy agreement that the house was reasonably fit for occupation. Sankey J. ruled that the special plea constituted no defence to the claim for rent, for which the plaintiff, accordingly, obtained judgment; and the litigation thereupon resolved itself into a serious and hard-fought contest on the counterclaim, upon which the defendant was successful, obtaining judgment for £225. Notwithstanding these facts, the Taxing Master taxed the costs of the plaintiff at £214 5*s.*, and of the defendant at £3 0*s.* 5*d.*, which, as Atkin L.J. said, was enough to show that there was some flaw in his reasoning. The flaw he considered was this: that, whilst in one sense the Taxing Master must tax the costs of the claim on the footing that there is no counterclaim, that is subject to the over-riding condition that he must ascertain what are the costs really incurred by the plaintiff in establishing his claim, and really incurred by the defendant in establishing his counterclaim. He must ascertain what costs have in truth and in fact been incurred by the plaintiff and the defendant in prosecuting or litigating the claim and counterclaim respectively. Here, as in *Fox* v. *Central Silkstone Collieries, Ltd.* (4), the fees which the Court held should be apportioned had been paid to counsel in respect of his performance of a dual service, i.e., a real, not merely a nominal dual service; and the expenses of witnesses, which it was held should also be apportioned,

(1) [1898] 2 Q. B. 500.
(2) [1910] 2 Ch. 92.
(3) 11 Ch. D. 416.
(4) [1912] 2 K. B. 597.
(5) [1921] 2 K. B. 17.

were attributable not solely to claim or solely to counterclaim, but to both. In taxing the "costs of action," whether awarded to plaintiff or defendant, it is the duty of the Taxing Master to ascertain the costs which the successful party has in truth incurred in that action; for it is those, and those only, which he is entitled to recover. Likewise, in taxing the costs of a counterclaim the party in whose favour they are awarded should receive those costs which were in truth incurred by him in the counterclaim, i.e., the costs which, as Lindley L.J. said in *Atlas Metal Co.* v. *Miller* (1), were "the costs occasioned by it."

The last case to which I wish to refer is *Forrest* v. *Carte* (2), and more particularly to the judgment of Holmes J., in which he deals with the principles underlying the taxation of the costs of claim and counterclaim with characteristic clearness and force. "Since the Judicature Act," he says (at p. 324), "apportionment is necessary where a defendant succeeds on a true counterclaim, but in all other respects the law, I believe, remains unaltered. The technical issues of the Common Law Procedure Act have disappeared; and in carrying out the present rule, that the costs of every action, question, and issue shall follow the event, it is necessary to ascertain what have been the substantial matters in controversy between the parties."

From this mass of authority I deduce the following principles, which I put forward as being not only supported by authority which I have cited, and as reconciling some decisions which at first sight might appear to be somewhat in conflict, but also as according with justice and commonsense:—

1. In the taxation of the costs of a claim and counterclaim, in one of which the plaintiff has been successful and in the other of which the defendant has succeeded, the party who has obtained judgment with costs on the original claim is entitled to recover all costs exclusively referable to the claim, whilst the party who has obtained judgment with costs on the counterclaim is entitled to recover all costs exclusively referable to the counterclaim.

2. Whether the common items in the costs (i.e., the items which contain something apparently common to both claim and counterclaim) should be allowed in full to the successful party on the original claim, or should be apportioned as between the claim and counterclaim, depends in each case upon whether such costs were in truth and in fact occasioned solely by the claim or partly by the claim and partly by the counterclaim.

3. Such costs are regarded as being occasioned solely by the claim and are, accordingly, allowed in full to the party who succeeds in the claim, when the counterclaim is a counterclaim in form only, and is in reality in the nature of a set off: *Samuel* v. *Burnham* (3), or where it is really a defence in disguise: *Coulter* v. *Crangle* (4), or where both claim and counterclaim arise out of the one transaction and in effect raise the same issue: *Duffy* v. *O'Meara* (5).

4. Such costs of common items are, on the other hand, regarded as being occasioned partly by the claim and partly by the counterclaim, and are, accordingly, apportioned when the counterclaim raises

(1) [1898] 2 Q. B. 500.
(2) [1897] 2 I. R. 314.
(3) 42 I. L. T. R. 24.
(4) 3 N. I. J. R. 158.
(5) 5 I. W. L. R. 147.

High Court of Appeal. 1922.

CREAN v. M'MILLAN.

Andrews L.J.

a separate and independent cause of action: *Fox* v. *Central Silkstone Collieries, Ltd.* (1), and *Christie* v. *Platt* (2)—that is, when the counterclaim is a real and bona fide or true counterclaim, looking at its substance as distinguished from its form; when, in other words, it is something in respect of which additional expense must reasonably be assumed to have been incurred—something which occasions a new work or a new service distinct from the work or service occasioned by the original claim.

The real issue in the present case, as it appears to me, was one which was common to both claim and counterclaim, viz., which party broke the contract? Was the defendant guilty of a breach of the contract in refusing to accept the goods, or were the plaintiffs guilty of a breach of the contract in neglecting or refusing to deliver the goods in accordance with the terms of the contract? That the plaintiffs themselves regarded both claim and counterclaim as involving the same issue is best evidenced by the fact that, save in the copy of the pleadings, neither the plaintiffs' briefs nor case for proofs contains any reference whatever to the defendant's counterclaim.

In these circumstances, I have no hesitation in coming to the conclusion that this case falls within the third proposition which I have enunciated above, the so-called common costs having been occasioned solely by the claim. In my opinion, the Taxing Master has proceeded on the correct basis in allowing such costs in full to the defendant, who succeeded on the original claim, and the appeal must be dismissed with costs.

Solicitors for the appellants: *George D. Fottrell & Sons.*
Solicitor for the respondent: *Joseph Campbell.*

C. L.

(1) [1912] 2 K.B. 597. (2) [1921] 2 K.B. 17.

M'KNIGHT *v.* ARMAGH COUNTY COUNCIL; SMYTH *v.* SAME (1).

Appeal. (*S. I.*) 1921.

Nov. 17. Dec. 19.

High Court of Appeal. 1922.

Feb. 2, 3, 28.

Malicious injury — Attack by hostile force on police barrack — Counter-attack by Crown forces — Neighbouring premises — Destroyed by order of commanding officer — Malice — Compensation — Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 135—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5.

An attack was made upon police barracks by a large hostile force. A mixed force of military, ordinary police, and special police came to the relief of the barracks. The relieving party on their arrival at once attacked, and in the course of the fight certain premises were set on fire, and destroyed by order of the military officer in command of the relieving force. The owner and tenant of the destroyed premises applied for compensation.

Held, by the High Court of Appeal for Ireland (reversing the Court of Appeal in Southern Ireland), that as the damage was done by the military in carrying out the lawful orders of the commanding officer, the necessary element of malice was eliminated, and compensation could not be recovered; also that the liability of the county was strictly limited by statute, and ought not to be extended beyond those limits.

Per Sir John Ross C.: The county is not to be treated as a tort-feasor at common law. Compensation was intended to be given by the Criminal Injury Code only in a case where the injury was of a criminal nature; the county was to be liable for the primary acts only, and not for consequential acts, which may not be criminal at all.

Per Andrews L.J.: An applicant should not be allowed to make on appeal a new case, and one inconsistent with that made by him at the hearing before the Judge of Assize.

CASE STATED at the Armagh Spring Assizes, 1921, by Mr. Justice Dodd under the provisions of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), sect. 5.

The case stated was as follows:—

These cases came before me sitting as Judge at the Assizes in Armagh, spring, 1921. Mr. M'Knight claimed for injury to premises, "a dwelling-house occupied by Miss Mary Smith as tenant under me, and the adjoining dwelling-house occupied by Mr. Michael Tierney under me." Michael Smyth claimed for the grocery, stock-in-trade, household furniture, chattels and effects, and fittings in the shop and premises, which were wholly destroyed by fire. The applications were both dated 20th day of December, 1920.

The County Court Judge gave a decree, dated 10th February, 1921, in M'Knight's case for £336 10*s.* with costs and expenses, making altogether £358 15*s.*, which he directed to be paid off the county at large. He gave a decree in Smyth's case for £350 with costs £20 3*s.*, making altogether £370 3*s.* The injury in each case was stated in the application to have occurred on the morning of Monday, 13th

(1) In the Court of Appeal in Southern Ireland, before O'CONNOR M.R., and RONAN and O'CONNOR L.JJ.
In the High Court of Appeal, before SIR JOHN ROSS C., MOLONY C.J., and ANDREWS L.J.

Appeal. (*S. I.*) 1921. M'KNIGHT *v.* ARMAGH CO. COUNCIL.

December, 1920. The originals will be lodged with the Registrar along with this case.

It appeared in evidence before me that a determined attack was made upon the police barracks in the village of Camlough by a large hostile force. There was a small force of police, seven in all. The attack began late at night on the 12th December. Communication was established with Newry, and a force under the command of a military officer came to the relief. The seven police held out. The military on their arrival were ordered to attack, the name of the commanding officer being given.

The County Council did not raise the question of malice. It was raised by Mr. Johnson, solicitor for some ratepayers. He put three questions to the sergeant of constabulary and a constable whom he called: 1. Did you hear the military commander give the order to do what is complained of? 2. Did you see that the men were in uniform? 3. Did you hear the officer in Court give his name to the County Court Judge and say it was by his authority the burning took place? To all of which the two witnesses answered, "Yes." I asked the sergeant to tell me, if he could, the constituents of the force. He said there were:—1, military; 2, ordinary police; and 3, special force. They were all, he said, under the command of the military officer. There was no suggestion from counsel for the applicants at that time that this order and this statement were in some other case. He did object that a statement by the officer was not admissible on a question of malice. I thought it was evidence.

Serjeant Hanna, in his notes, to which I shall refer, states this evidence was confined to Doyle's case. Doyle's case was not before me. In that case the learned serjeant did not contest the finding of the County Court Judge, that an act done by express military command in repressing an attack upon a barracks was not malicious, and no evidence was given before me. The County Court Judge apparently had thought there was some distinction between Doyle's case and this, for he dismissed Doyle's application, and granted relief in these. It will be noticed that in the applications "the night of" is struck out of the printed form and the "morning of" inserted. The effort apparently was to make this action what is called a reprisal rather than an actual step in the transactions. The serjeant suggests that Doyle's was on the other side of the river, and necessarily demolished. I inquired as to the premises. They were described to me, though neither side had a map. I am saved the trouble of writing out a description, as a map has now been furnished to me, which I shall also lodge with the Registrar if the Court desire to see it. It accurately sets forth what was conveyed to me. The contention apparently is that the one operation was justifiable, the other was not.

It appeared that part of the premises destroyed consisted of a Sinn Fein hall. M'Knight dissociated himself from it. It appeared further that the garden from Smyth's wall was loopholed so as to enable guns to be used. The barracks stood in a sort of triangle. They could be attacked from the front or the side—were, in fact, attacked from both. Premises on the other side of the street that afforded shelter to the assailants were destroyed. The houses on the side of the barracks—M'Knight's houses—which fronted the barrack

premises, were the subject of this inquiry. The sergeant and constable swore that it was men in military uniform who burnt the houses of M'Knight, and obedient to command.

An arrangement was made for a shorthand note of my judgment. The reporter, owing to the noise in Court, says he was unable to get it in detail. I gave a short précis of it to the reporter, which was communicated to both sides. I asked Mr. Johnson to instruct counsel so that I might settle this case in conference. He did not do so. I suppose he is unwilling to incur expense.

I therefore draft this case myself, and neither side is responsible for any inaccuracy. I have asked the Clerk of the Crown to get the contentions from the solicitors. I accordingly put them all in an envelope that the Court may, if so advised, have every scrap of paper that is by any possibility of assistance. I declined to go into any matters of so-called "reprisals." The word is not familiar to me in my common law reading, and I am not aware of any statutes regarding it. One does know something of it, whether preventive or punitive, in international law.

I have no wish to decide any general proposition of law, nor did I see why the Newry ratepayers should be called upon to establish the law. All I had to decide was whether the act was malicious. I was of opinion that malice was negatived, if the act was done by the forces of the Crown, acting under military command. I could not inquire into the quality of the act, whether it was from a military point of view necessary or not. I had no knowledge to guide me, no principles of law applicable as to the attempt to make the occurrence of the early morning, one o'clock of the 13th December, severable from the transaction of the late night of the 12th. I gave it no favour. I thought the whole transaction was one, and so held as a fact. If there were excess, that did not, I thought, warrant me in finding malice. It was, I said, as if a fire brigade in fighting fire had done more damage than need be; that would not be proof of malice. I did not decide Mr. Johnson's point that all acts done by the military acting as a force were outside the purview of the code of criminal injuries in Ireland; that the law-abiding community should not be made answerable for injuries done by people whom they could not control. Mr. Serjeant Hanna suggested that that followed as a corollary from my decision. I ventured to remind him that Lord Halsbury said that did not follow even from a decision of the House of Lords. He said it would upset all previous cases from Camlough on that night (or morning). I did not know why the counsel for the County Council did not contest the other case—that of Turley, for instance. The amount was agreed to upon consent. I did not know why Mr. Johnson did not intervene in the other cases. All I had to do was to decide upon the question, malice or no malice, in the case before me. Nor did I know why the County Court Judge fixed the area of charge on the county at large. I was anxious, so far as I could, to comply with the serjeant's requisitions and state a case, that he might be able to raise the broader issue he had in mind, and it is with that view I have included every fact and document that might influence the Court.

1. It would seem, if I were right in holding that malice had not been proved, that the applications should be dismissed with costs, which

Appeal. (*S. I.*) 1921.

M'KNIGHT v. ARMAGH CO. COUNCIL.

I did in both cases. 2. If I were wrong, decrees should be given in M'Knight's case for £336 10*s.* and £22 5*s.* costs and expenses in the Court below, no costs of appeal; and in Michael Smyth's case £200 with £20 3*s.* costs in the Court below and no costs of appeal. 3. If the Court think that the matter demands fuller investigation into the facts, it will, I presume, be open to the Court to adjourn the appeals till next Assizes.

I venture to submit that the costs of the ratepayers should be borne by the County Council, whose duty the ratepayers are discharging.

There is lodged herewith: 1, the map; this is, I find, in evidence, both sides having referred me to it. 2. The application of M'Knight. 3. The application of Smyth. 4. Decree in favour of M'Knight. 5. Decree in favour of Smyth. 6. Précis of my judgment at the trial. 6*a*. Serjeant Hanna's notes in red ink. 6*b*. Serjeant Hanna's précis of evidence he is prepared to give. 7. Mr. Johnson's points.

In the High Court of Appeal the case was sent back to Dodd J. for answers to the three following questions:—

1. Was the attack on the barrack over when the premises were set fire to?

2. By whom were the premises burned, by military or civilians?

3. If by the military, was it done by the order of the commanding officer?

Dec. 19.

The learned Judge replied as follows:—

In answer to the queries submitted to me by the Lord Chancellor, I desire to say as follows:—

1. Was the attack on the barrack over when the premises were set fire to? The answer is "No." Serjeant Hanna, in his memorandum sent in after my judgment, suggested something of the kind. Upon that I say in my report—"As to the attempt to make the occurrence of the early morning severable from the transaction of the late night, I gave it no favour. I thought the whole transaction was one, and so held as a fact." There is on the margin of the copy of my report sent to me a query as to the dates being incorrectly inserted. If there be a mistake in this, the mistake does not affect my judgment. The dates, whichever be the correct dates, were the dates on which the barrack was attacked. If they are inaccurate, no correction was made when my draft case was submitted to Serjeant Hanna.

2. By whom were the premises burned, by military or civilians? The actual persons who carried out the order of the military officer were not given in evidence. I again refer to my report—"He [the sergeant of police] said there were—1, military; 2, ordinary police; and 3, special constables. They were all, he said, under the command of the military officer"; and I respectfully refer to the three staccato questions put by Mr. Johnson and the replies thereto. I found as a fact that what is complained of was done by military command and by order of the commanding officer.

I desire respectfully to add that an attempt was made at a later Assize in Fermanagh to press my decision further than it went. It was sought to plead justification for a special constable. I held that police officers would be bound to satisfy the tribunal as to the facts warranting their action as conservators of the peace. My decision in

Armagh was confined to a military officer in command of forces under his command.

I rather went out of my way to gratify Serjeant Hanna by sending in his criticism on my judgment, if the Court thought it right to refer to it. He seemed to suggest that if other facts had been put in evidence the decision might have been different, grounding a possible application for an adjournment.

With all respect, the answers to the queries, I think, are contained in my case stated. I do not wish to do anything that would seem to be arguing in favour of a decision under review.

Serjeant Hanna and *C. S. Campbell*, for the appellants, the applicants.

Davison, for the Armagh County Council.

Rearden, for the Bessbrook Spinning Company.

The arguments were substantially similar to those in the High Court of Appeal.

O'CONNOR M.R.:—

I may very shortly state the facts of this case. An attack was made by an armed force of revolutionaries against the police barracks situate in the village of Camlough. There is no doubt that the object was to compel the police to capitulate, if not to kill them, and to destroy the building. The attack was a determined one; but the police held out, and were relieved by a military force which came to their assistance.

In the course of the operations considerable damage was done to premises in the vicinity of the barracks, and the parties interested in certain of these premises have made claims against the county on the ground that the damage was done maliciously.

It is not stated positively that the damage complained of was the act of the military, but I gather from the case that that was the view of Mr. Justice Dodd, and I will proceed on that assumption. It is found as a fact that the damage was done during the operations of attack and defence, and was one of the incidents of the whole occurrence. The claim for compensation was resisted by certain ratepayers on the ground that, as the damage was done by the military in carrying out their lawful orders, the element of malice was necessarily eliminated, and that argument weighed with the learned Judge, who disallowed the claims.

On first consideration it would seem that this decision was right; but further reflection must lead to the conclusion that, although the immediate act of destruction was the work of the military, to whom malice cannot be imputed in the discharge of their duty, the damage done was the natural and probable consequence of the initial act of persons who commenced the work of destruction. I do not think that I need quote authority for the proposition that every person is responsible for the natural or probable consequences of his illegal acts. This I conceive to be well recognized, but, of course, there

Appeal. (*S.I.* 1921. M'KNIGHT *v.* ARMAGH Co. COUNCIL. O'Connor M.R.

may be difficulty in applying it in particular cases. The question of remoteness may arise. I do not think that on the facts there can be any question of remoteness here.

The circumstances were these. The attack on the barracks was made according to plan. There was a frontal and lateral attack. The claimants' premises were on the side and situate a short distance from the barracks. The walls of the claimants' premises were loopholed to enable the attacking party to fire on the defenders, and were thus made part and parcel of the field of operations. Those who were engaged in the attack must, therefore, have known that they exposed the premises to the danger which must arise from warlike operations. One of the ways of resisting an attack, and sometimes the best way, is to capture the enemy's point of vantage, or to destroy it. This is exactly what was done in this case. The claimants' premises, occupied and loopholed by the enemy, were attacked by the military who relieved the police barrack. I must regard this as immediately flowing from the initial act of malice. I cannot go on to inquire how far the whole operations were absolutely necessary. The extent of necessary military action cannot be determined, and it must be assumed that it was proper.

If this were a case of what has been called reprisal, by way of punishment for the attack, it might be fairly alleged that the damage done was not the natural or probable consequence of the attack on the barracks; but it has been found as a fact that it was part of the whole occurrence, and not a subsequent act. But I may say that if the damage was done by way of reprisal after the conclusion of the necessary military operations the ratepayers would then possibly be met by an illegal, and as such, a malicious act. It is not necessary, however, for the purposes of the present case to so decide.

In my opinion there was malicious damage, the probable consequence of the act of wrongdoers, and the claimants are entitled to compensation.

RONAN L.J. :—

The ground upon which Dodd J. reversed the order of the County Court Judge was that there was no proof of malice. In his judgment he defines "malice," or rather "a malicious act," as "a wrongful act deliberately done without lawful justification or excuse."

I think he finds in fact that the premises were deliberately burned by the order of the officer in command of the military and police. Apparently he declined to inquire whether this order and the action under it were justifiable or not. It is plain that the only justification or excuse for such an order and act was that they were reasonably necessary for the defence and protection of the police and their barrack.

But if this was an unnecessary act by the military, it would be an illegal and malicious act, and therefore the subject of compensation. Assuming, however, that it was a proper course for the military to have taken, it is clear that it was a consequence which must have been within the contemplation of the attackers. Even if this particular damage was not contemplated, the law as to the liability of a party

for the consequence of his negligent or wrongful act has been clearly laid down in *Polemis* v. *Furness, Withy, & Co.* (1), to which I referred in my judgment in *Mahony* v. *Kerry County Council* (2). In that case the controversy carried on between the late Mr. Beven, following the decision of Blackburn J. and Channell B. in *Smith* v. *London and South-Western Railway Co.* (3) on the one side, and Sir Frederick Pollock, following Pollock C.B. in *Greenland* v. *Chaplain* (4), on the other, was decided in favour of Mr. Beven's contention.

Discussing the question of the chain of causation, or the intervention of the act of a third party, Lord Sumner said in *Weld-Blundell* v. *Stephens* (5): "Again, between the negligence of a defendant and the infliction of hurt or loss on a plaintiff, the action of human beings may intervene in a great variety of ways; the action of children or other irresponsible creatures; of persons in a state of excusable ignorance acting without any intention to injure others; of persons in a state of excusable alarm produced by the wrongful acts of the defendant; of persons acting in the exercise or the defence of their rights and without intention to injure others; of persons acting as the defendant meant them to act, or acting as the defendant must have foreseen that they would act in consequence of things done by him for his own purposes, or in a state of indifference as to the result to others." For each of these cases he gives the authorities. They are all cases of negligence, but the principle laid down applies with even greater force to a malicious act.

For these reasons I am of opinion that the applicants in these cases are entitled to compensation for the malicious destruction of their property.

O'CONNOR L.J.:—

I concur, and for the reasons stated by the Master of the Rolls in his judgment.

1922. Feb. 28.

The County Council of Armagh appealed to the High Court of Appeal (6).

Gibson K.C. and *Davison*, for the appellants:—

The Criminal Injury Code is limited in its application to cases in which the perpetrators of the damage or destruction for which compensation is sought can be made criminally responsible. Upon the facts of this case it is evident that if the persons who had attacked the barracks had been charged with the arson of the houses burned by military command the case could not have been allowed to go to the

(1) [1921] 3 K. B. 560.
(2) 56 I. L. T. R. 8. Note.
(3) L. R. 6 C. P. 14.
(4) 5 Ex. 243.
(5) [1920] A. C. 956, at pp. 984-5.
(6) In the High Court of Appeal, before SIR JOHN ROSS C., MOLONY C.J., and ANDREWS L.J.

High Court of Appeal. 1922.

M'KNIGHT v. ARMAGH CO. COUNCIL.

jury. In *English* v. *County Council of Kerry* (1), Palles C.B. stated that under sect. 135 of the Grand Jury Act, 1836 (6 & 7 Wm. 4, c. 116), "the people of the county or locality in which the injury was committed were not treated as wrongdoers." These words are to be preferred to any dicta to the contrary in *Ballymagauran Co-operative Agricultural and Dairy Society* v. *County Councils of Cavan and Leitrim* (2) or subsequent cases, such as *Noblett* v. *Leitrim County Council* (3) and *Worthington* v. *Tipperary County Council* (4). The liability of the county is statutory, and cannot be extended by reference to the supposed policy of such ancient statutes as those mentioned in the judgments in the *Ballymagauran Case* (2). If any of the dicta in the judgments in that case can have the meaning attributed to them in subsequent cases, it is submitted that they are erroneous. The injury was too remote.

Serjeant Hanna and *C. S. Campbell*, for the respondents:—

The destruction of the premises in this case was the natural and probable result of the wrongful attack on the barracks. In criminal law a person is presumed to have intended the natural and probable consequence of his act: *Walker* v. *London and Provincial Insurance Company* (5); *The Queen* v. *Latimer* (6). If it is natural and probable that a third party will intervene, then that intervention becomes the natural and probable consequence of the original act: *Scott* v. *Shepherd* (7); *Clark* v. *Chambers* (8); *Hill* v. *New River Company* (9); *Devlin* v. *Belfast Corporation* (10); *Ruoff* v. *Long & Co.* (11).

Gibson, in reply.

SIR JOHN ROSS C.:—

These cases come before us on an appeal from the decisions of His Majesty's Court of Appeal in Southern Ireland on a case stated by Dodd J. in the matter of applications for compensation by two claimants for criminal injuries to property.

The learned County Court Judge of Armagh gave decrees in favour of the applicants on 10th February, 1921. These decrees were reversed by Dodd J. at the Spring Assizes, 1921. Appeals from these orders were heard by His Majesty's Court of Appeal in Southern Ireland on 19th December, 1921, who reversed the decisions of Dodd J., and affirmed the decrees given by the County Court Judge.

James M'Knight claims in respect of a dwelling-house and shop occupied under him by the other applicant, Michael Smith, who claims in respect of stock-in-trade, furniture, chattels, and effects in the said house.

On the night of the 12th December, 1920, a determined attack was made on the police barracks in the village of Camlough, County Armagh, by a large hostile force. There were seven police in the

(1) 34 I. L. T. R. 76.
(2) [1915] 2 I. R. 85.
(3) [1920] 2 I. R. 143.
(4) [1920] 2 I. R. 233.
(5) 22 L. R. Ir. 572, at p. 576.
(6) 55 L. J. M. C. 135.
(7) 2 W. Bl. 892.
(8) 3 Q. B. D. 327.
(9) 9 B. & S. 303.
(10) [1907] 2 I. R. 437, 448.
(11) [1916] 1 K. B. 148.

barracks, who resisted the attack. Communication was established with Newry, which, as appears from the map, is about four or five miles distant. A mixed force of military, ordinary police, and special police, all under the command of a military officer, came to the relief of the barracks. The relieving force on their arrival at once attacked, and in the course of the fight the premises in respect of which these claims have been made were set on fire and destroyed by command of the military officer. The barracks stood in a kind of triangle, and could be attacked from the front or the side—they were, in fact, attacked from both; premises that afforded shelter to the assailants were burned. M'Knight's house, which fronted the barracks, was the subject of this claim. The garden wall in connexion with the house was loopholed to facilitate the attack.

The claim for compensation was resisted by certain ratepayers on the ground that the damage was done by the military in carrying out the lawful orders of the commanding officer, and that thus the necessary element of malice was eliminated. This view was taken by the learned Judge who dismissed the claims.

On the other hand, it was contended that it was found as a fact to be one transaction, and that the destruction of the applicants' property by the military was the natural result of the original malicious attack. This was the view taken by His Majesty's Court of Appeal, who reversed the learned Judge's decision.

If the damage were caused by a wrongful act or an act of negligence on the part of somebody, that person would be in a civil action liable for all the direct consequences of the wrongful or negligent act, even though these consequences could not reasonably have been anticipated: *Polemis* v. *Furness* (1). Many cases have been cited to show that in a civil action the ordinary tort-feasor is liable for what are called the natural and probable consequences of his illegal acts, even in case of the intervention of a third party.

As showing the difficulty of the terms usually applied, I refer to Lord Sumner's trenchant criticism in *Weld-Blundell* v. *Stephens* (2) on the words "natural, probable, and necessary," "effective cause," and "causa causans," and such like. I also refer to his statement of cases where, between the negligence of a defendant and the damage, the action of human beings may intervene in a great variety of ways, such as the action of children or other irresponsible creatures or of persons in a state of excusable excitement.

I adopt the language of Bowen L.J. in *Cobb* v. *Great Western Railway Co.* (3), where he speaks of the damage being such as would flow from the breach of duty or wrongful act in the ordinary and usual course of things. Sometimes even the intervention of a crime as a new and independent factor will not save a defendant from liability, but that is usually in cases where the defendant's own negligence has rendered the crime possible: *London Joint-Stock Bank* v. *Macmillan* (4). But even in civil actions there must be some limitation in respect of damage following the wrongful act. There are some matters apparently in the chain of causation in respect of which a defendant cannot reasonably or justly be held liable.

(1) [1921] 3 K. B. 560.
(2) [1920] A. C. 956, at pp. 983, 985.
(3) [1893] 62 L. J. Q. B. 335.
(4) [1918] A. C. 777.

High Court of Appeal. 1922. M'KNIGHT v. ARMAGH CO. COUNCIL. Sir J. Ross C.

The decision in *Polemis* v. *Furness* (1) is not to be carried too far. It merely decides that the defendants were liable for all the direct consequences of the negligence, even though these consequences could not reasonably have been anticipated. It does not abolish in all cases the effect of a novus actus interveniens, nor does it exclude all questions of remoteness. It still remains the law that the damage must be the direct consequence of the wrongful act. It is going very far to say that the damage caused by the burning of these houses would flow from the trespass in the ordinary and usual course of things.

We must consider the number and nature of the intervening contingencies: 1st, that a message would get through to the relieving force; 2nd, that the force would be able, notwithstanding the usual obstacles, to get through in time; 3rd, that when it would arrive the officer in command would think it necessary to burn the house.

Suppose that in a civil action against the wrongdoers damages could be recovered, does it follow that the County Council is liable? It is said the County Council is put in the place of the trespassers and liable for all the damage that should be awarded against the wrongdoer. The liability of the County Council is, I hold, strictly limited by the statute, and ought not to be extended beyond those limits.

It is said that the county is to be treated as a tort-feasor at common law. *The Ballymagauran Dairy Society* v. *County Council of Cavan* (2) is relied on for this proposition. I do not deny that the dicta of the learned Judges tended in that direction. But we must keep strictly in view what the Court really did. It decided that inasmuch as the county was primarily liable to pay compensation for a malicious injury, compensation cannot be refused because the claimant is insured against loss. In effect it decides nothing more than that. This decision, which is sound and right beyond question, has been used to enlarge the operation of the malicious injuries code to an extent never contemplated in former days. In *English* v. *Kerry County Council* (3) the Lord Chief Baron Palles is reported to have said:—"Under the section the people of the county or locality in which the injury was committed were not treated as wrongdoers." In the case of *Noblett* v. *Leitrim County Council* (4) the Lord Chief Baron is represented as completely reversing this opinion by his observations in the *Ballymagauran Case* (2). He certainly does not say so. For my own part I cannot concur in the conclusion arrived at by the learned Lord Chancellor in *Noblett's Case* (5), when he says "that the same principle is to be applied as if it were a civil action in tort against the actual wrongdoer himself."

I desire to hold myself at liberty to question whether the case of *Noblett* v. *Leitrim County Council* (4) was rightly decided. In a former case—*Leyburn* v. *Armagh County Council* (6)—I have made the same reservation as regards *Tyler's Case* (7).

If the policy of the code is punitive, as imputing negligence to the ratepayers, that is all the more reason for a strict construction of the acts in favour of the ratepayers.

(1) [1921] 3 K.B. 560.
(2) [1915] 2 I. R. 85.
(3) 34 I. L. T. R. 76.
(4) [1920] 2 I. R. 143.
(5) [1920] 2 I. R. 143, at p. 153.
(6) [1922] 2 I. R. 58.
(7) [1921] 2 I. R. 8.

Sect. 135 of the Grand Jury Act received a strictly limited interpretation from all the Irish Courts down to 1915. Its meaning would appear to be quite clear. It specifies certain kinds of malicious injury to property, and provides that the Grand Jury may present such sums as the person so injured ought to receive for such injury or damage. It is plain that the malicious injury would be criminal, and sect. 137 provides that the injured person shall be bound by recognizance to prosecute the wrongdoer. The swearing of an affidavit containing a statement of the deponent as to his knowledge of the guilty person was held to be a condition precedent to the claimant's right to recover: *In re Tobin* (1). What light does this throw on the matter? It indicates that the remedy was intended only to be given in a case where the injury was of a criminal nature. From this I infer that the county was to be liable for the primary acts only, and not for consequential acts, which may not be criminal at all. The house and furniture in this case were destroyed by the military, and their act was not malicious.

But if the wider construction be adopted, I am of opinion that the injury is too remote, because so many contingencies and happenings intervene between the original malicious act and the damage suffered. In my opinion, if the original offenders were indicted for burning these premises and furniture that were burned by the military, the case should not be allowed to go to the jury. Peace officers are bound to suppress breaches of the peace, and they are justified in causing any damage necessary for this purpose; but I have never heard of any case in which the persons guilty of such breaches of the peace were held liable in any Court, civil or criminal, for the damage so caused. Speaking for myself, I entertain the gravest doubts as to whether the extensions of the interpretation of these sections that have taken place since 1915 are warranted by the words of the statutes. The policy of the Grand Jury Act was to stimulate the people of the locality in which the malicious injury took place to exert themselves in suppressing these crimes, and to be vigilant in bringing such offenders to justice.

In the *Ballymagauran Case* (2) the Lord Chief Baron carefully reviews the statutes preceding and in pari materia with the Grand Jury Act, and traces them back to the statute of Winchester, 13 Edw. 1, 1285. He is inclined to think that the liability was part of the common law, and descended from pre-Norman times. If the policy of these statutes is to be considered, we must have regard to the circumstances of the times and the legal ideas then prevalent; see Halsbury, vol. xxvii, p. 141: "In the construction of ancient statutes it is proper also to consider the general state of contemporary public sentiment." Now, in the thirteenth and fourteenth centuries, when there was no organized police force, the paramount idea in the minds of the legislators with a view to the preservation of peace and order was communal responsibility. There is no doubt that under feudal conditions then existing such a policy was most effective, and it is probable that the punitive measures authorized were drastically enforced.

At the present time it seems to me unsafe to give undue weight to this doctrine in the construction of a modern statute by appealing to the policy of early statutes based upon legal ideas and conditions of

(1) Res. Cases, 1860–64, p. 2. (2) [1915] 2 I. R. 85.

High Court of Appeal. 1922.

M'KNIGHT v. ARMAGH CO. COUNCIL.

Sir J. Ross C.

society which have passed away. What is the necessity for straining the plain words of the Act to make it more punitive?

The change in judicial opinion came shortly before and during a most unfortunate time. What was the state of affairs? Armed bands in large numbers were contending all over the country; they were inflicting reprisals by destroying the property of persons supposed to be in sympathy with one side or other; they frequently came long distances in motor cars; the ordinary criminal courts had ceased to be operative; the inhabitants were powerless to suppress the crimes or to attempt to bring offenders to justice. The application of the original policy was quite out of touch with the circumstances then existing. All this goes to show the necessity for the strictest interpretation of the Act before unlimited and oppressive liability is cast on the ratepayers. Everyone will agree that innocent sufferers ought to be compensated from some source, but nothing can be more unjust and unreasonable than the imposition of these intolerable burdens on the ratepayers at such a time and under such circumstances.

For the reasons I have already given I am of opinion that the decision of His Majesty's Court of Appeal in Southern Ireland should be reversed, and the applications dismissed.

MOLONY C.J.:—

I do not share the doubts of the Lord Chancellor about the correctness of the decision in *Noblett's Case* (1), but in other respects I agree with his judgment.

It seems to me that in awarding compensation in cases of malicious injury the amounts to be awarded should include compensation for all loss or damage which is the natural and direct consequence of the injury inflicted, including consequential damages: *Noblett* v. *Leitrim County Council* (1), *Polemis & Furness, Withy & Co., In re* (2); but not punitive or vindictive damages: *Worthington* v. *Tipperary County Council* (3).

In the present case we are asked to say that because the original attack on the police barracks was malicious the county can be made responsible for the action of the Crown forces, who arrived from Newry after the attack had been made on the barracks, and who, in pursuance of their duty, took the steps which they thought necessary to put an end to the disturbance. The learned Judge of Assize came to the conclusion that the damage complained of was done by the forces of the Crown, acting under military command, and that there was no malice on their part, and with his conclusion I fully agree.

Admitting this to be so, the applicants contend that they are still entitled to recover compensation, because the damage sustained by them was the direct, or, as some would prefer to say, the natural and probable, consequence of the attack on the barracks. It seems to me that the damage claimed is altogether too remote, and I fully concur with the reasons given by the Lord Chancellor for arriving at the same conclusion.

In my opinion the appeal should be allowed, and the application for compensation dismissed.

(1) [1920] 2 I. R. 143. (2) [1921] 3 K. B. 560. (3) [1920] 2 I. R. 233.

ANDREWS L.J. :—

At the risk of a little repetition, I must set out some of the salient facts upon which we are asked to decide this case, and upon which my judgment is based.

On the night of 12th December, 1920, a determined attack was made upon the police barracks at Camlough by a large hostile force. The barracks were defended by a small garrison of seven police. They conducted the defence with great courage, determination, and skill; but I infer from the facts proved that they were so outnumbered by the attacking force that their operations were necessarily of a purely defensive character, and that it would have been an act of suicidal folly for them to have sallied forth from the protection afforded them by the barracks, and to have endeavoured to drive the rebel force from their strongly entrenched position. Unlike the defenders of many other barracks during the recent period of disorder, they were fortunate in being able to establish communication—by what means we are not told—with Newry, situate some five miles distant; and after the struggle had lasted for several hours a large mixed force consisting of military, ordinary police, and special constables, under the command of a military officer, came to their relief. Such military officer on arrival gave an order to attack; and when the rebels had been driven from their stronghold, the applicants' premises and property were destroyed, being set on fire with petrol by the express order of the commanding officer.

Dodd J. tells us in the case stated and in his answers to the queries which we submitted to him that he held as a fact on the evidence:—(*a*) that the attack on the barracks and the destruction of the applicants' property was one whole transaction, and (*b*) that what the applicants complain of was done by military command, and by the order of the commanding officer. In the absence of any evidence to the contrary, I must assume that such order was lawfully and properly given as a matter of military expediency or necessity. These findings of fact are binding upon us, and, in my opinion, they dispose of this case.

The course which the case has taken is remarkable. It is quite apparent from the case stated and documents incorporated therewith that the whole case which the applicants sought to establish before the Judge of Assize was that the destruction of their property was not carried out under order of the commanding officer and as part of one transaction with the attack on the barracks, but that it was, on the contrary, a wholly unauthorized and unjustifiable reprisal, effected by individual members of the force a considerable time after the attack on the barracks had terminated. This case failed on its facts before the learned Judge, and we are told that when the case came before the Court of Appeal in Southern Ireland it was admitted that it must fail there, having regard to the findings of fact in the case stated.

Speaking for myself, I think that, in these circumstances, the applicants' counsel should not have been allowed, or, as we are informed, invited by the Court to make a new and inconsistent case. More regard should have been had to the course of the trial before the Judge of Assize. If such a precedent were to be established and approved of by the Court, it would, in my opinion, in many cases result

High Court of Appeal. 1922. M'KNIGHT v. ARMAGH CO. COUNCIL. Andrews L.J.

in serious prejudice and injustice to respondents who might reasonably have deliberately refrained from calling evidence at the trial to rebut a case which might have been but was not then made.

The decision of the Court of Appeal in Southern Ireland rests entirely upon this wholly new ground. I cannot accept it. Whilst Dodd J. has held as a fact that the damage was caused by the relief force, acting under military command, the Court of Appeal has held that it was really caused by the rebels, because it was, in the opinion of the Court, the natural and probable consequence of their initial wrongful and malicious act. This they have done without any finding by the learned Judge who stated the case, and whose decision they were reversing, as to whether the destruction of the applicants' property was or was not the natural and probable consequence of the attack on the barracks.

To hold that the destruction of the applicants' property was the natural and probable consequence of the malicious attack on the barracks is, in my opinion, to confuse consequence with sequence. Let us consider some of the links in the chain of causation which it involves:—(*a*) That the beleaguered force would be able to establish communication with a relief force, notwithstanding all the efforts of the attackers to prevent them doing so; (*b*) that such relief force would be sufficiently strong to take the offensive, and to drive the rebels from their positions of strength; (*c*) that the constables would be able to hold the barracks until such force arrived; (*d*) that the officer in charge of the relief force would come to the conclusion, as a matter of military expediency or necessity, that the applicants' property should be destroyed; (*e*) that the commanding officer would give an order for its destruction; and (*f*) that such order would, in face of violent opposition, be so effectively carried out.

In my opinion, the links in the chain of direct causation are broken on the facts of this case by what Sir James Campbell C. calls in *Steele* v. *Belfast Corporation* (1) "a conscious act of deliberate volition" by a third party, viz., the commanding officer of the relief force. I am aware that many reported cases can be found in which it has been held, as in *Steele's Case* (1), that the negligent intervention of third parties does not necessarily make the defendant's original negligent act too remote; but, on the other hand, such an intervention may remove from an initial act of negligence or wrongful act responsibility for a subsequent injury. In such cases the proximate cause of the injury is not the original negligent or wrongful act, but the conscious act of the third party's volition (see judgment of Lord Dunedin in *Dominion Natural Gas Co., Ltd.*, v. *Collins & Perkins* (2)). A point is frequently reached, and, in my opinion, it is reached in this case, where, according to the common understanding of men, subsequent events cease to be the consequence of the original wrongful act, and become the consequence of something which happened subsequently, though but for the first act the event might or could not have been what it was. The destruction of applicants' property was one of the incidents which followed the wrongful act of the rebels in attacking the barracks; but it was not a legal consequence of the attack, for it was not, on a reasonable estimate of probabilities—by

(1) [1920] 2 I. R. 125, at p. 139. (2) [1909] A.C., at p. 646.

which alone a reasonable man can be guided—a consequence which the attackers must be presumed to have contemplated. The learned Judge finds as a fact that what the applicants complain of was done by military command. By this he obviously intended to convey that it was this conscious act of volition on the part of the third party—the relief force—which was the direct cause of the injury to applicants' property. In these circumstances, I decline to indulge in idle metaphysical or theoretical speculation as to another possible, but necessarily more remote, cause.

So far I have dealt with the case upon the general principles applicable to liability for tortious acts; but I must add that I was much impressed by Mr. Gibson's argument on behalf of the County Council on the sections of the Malicious Injury Acts, which, as the Lord Chancellor pointed out in *Leyburn's Case* (1), constitute a most artificial code, and can only be utilized in cases coming strictly within its terms. Whether we take sect. 135 of the Grand Jury (Ireland) Act, 1836, or sect. 1 of the Malicious Injuries (Ireland) Act, 1853, it is an essential condition of liability that malicious damage should be done by one or more persons to the property of another or others. In that event the person or persons so injured may recover compensation for such injury or damage as he or they may have sustained thereby. How can these sections apply to the facts of the present case? The rebels maliciously injure the property of the Inspector-General of the Constabulary. A third party, namely, the mixed force, come to assist in the defence of the barracks, and commit an act, which, unless authorized and justified by the circumstances of the case, would clearly amount to a malicious act by such third party. How does such act cease to be the act of such third party and become in law the wrongful act of the rebels merely because the work of destruction was justifiable as a matter of military expediency, and was carried out under order of a competent military commander?

In my opinion, if one of the rebels had been captured and indicted for injury to or destruction of applicant's property, no Judge would or should have allowed the case to go to the jury. Otherwise, it would seem to follow that if either of the applicants had been killed by the mixed force in the destruction by them of his property, the captured rebel should be found guilty of murder.

For these reasons I am of opinion that the destruction of applicant's property in this case was sustained, not by reason of such unlawful acts or offences as are mentioned in the sections referred to, but, on the contrary, was caused by the forces of the Crown, acting under control and lawful military command, and as a matter of military expediency or necessity. In my opinion it is impossible in such circumstances to impute malice to the work of the military; and, accordingly, the decision of the Court of Appeal in Southern Ireland should be reversed, and the applications dismissed with costs.

Solicitor for the appellants: *H. J. Harris.*

Solicitors for the respondents: *O'Hare & O'Hagan.*

Solicitor for the Bessbrook Spinning Company, ratepayers: *Wm. Johnston.*

C. L.

(1) [1922] 2 I. R. 58.

K. B. Div. (*S. I.*) 1922. Feb. 24.

EVADNE BELL, Petitioner, *v.* ISAAC BELL, Respondent (1).

Restitution of conjugal rights—Desertion—Jurisdiction—Domicile—Foreign subject domiciled in Ireland—Effect of decree.

The respondent was born in 1880 in the United States of America, both his parents being subjects of those States. At the age of eight he left his native country and never returned there, living at first with both his parents at the Hague, and afterwards with his widowed mother in France. When he was about thirteen or fourteen years of age he went to England, where he received his school and university education, and resided with his mother in Leicestershire. In 1902 he came to Ireland, and resided first in Galway as Master of the Hounds, and afterwards in Kilkenny as Master of the local Hunt. In 1909 he married the petitioner, an Irish lady. The settlement executed on the marriage contained a proviso that it and the rights of parties thereunder should be construed as if the respondent was domiciled in Ireland, and as if both husband and wife were to be domiciled in Ireland for their respective lives. In 1917 the respondent purchased a freehold house in the county of Kilkenny, and he resided in that county with his wife from 1909 until 1921, when he left his wife, informing her that he intended to live with another woman, and stating an address in London as his "permanent residence." After he had left his wife, and before the date of the petition, the respondent conveyed his interest in his freehold house to the petitioner absolutely.

On petition for the restitution of conjugal rights: *Held*, that on the facts the respondent had an Irish domicile, and the Court had jurisdiction to give the relief sought, it being immaterial whether the respondent was or was not still a citizen of the United States of America.

Semble: In accordance with the principles laid down in *Westropp's Divorce*, 11 A. C. 294, adopted in Parker's Divorce Bill, 1917, disobedience to a decree for the restitution of conjugal rights made by an Irish Court may be held to be desertion, and it is not necessary for the purposes of a divorce bill to prove actual desertion for at least two years.

Petition.

The petitioner, Mrs. Evadne Bell, of Kilcreene House, County Kilkenny, by the prayer of her petition sought a decree for the restitution of conjugal rights with the respondent, her husband, Isaac Bell.

The respondent did not appear, and was not represented at the hearing of the petition. The petitioner and her father, Colonel Claude Cane, were examined. The material facts, as deposed to by them and disclosed in the documents put in proof, were as follows:—

The respondent was born in 1880 in the United States of America. Both his parents were citizens of the United States, and when eight years of age he went with his parents to reside at the Hague, on the appointment of his father as Ambassador of the United States Government at that place. He never afterwards resided in or was domiciled in America. Having taken up his post at the Hague, the respondent's father died two years later, and the respondent went to reside with his mother in France, living there until he was about thirteen or fourteen years of age, when he went to Harrow School, in England. From Harrow the respondent went to Cambridge, which he left in 1900 to

(1) Before Dodd J.

take up residence with his mother in Melton Mowbray, in Leicestershire. In 1902 the respondent came to Ireland to take up the Mastership of the Galway Hounds, which he held until 1908, when he took up the Mastership of the Kilkenny Hounds, taking, on long lease, a house in the county of Kilkenny. On the 10th of August, 1909, at Christ Church, Celbridge, County Kildare, the respondent married the petitioner under the form of the Church of Ireland. The marriage settlement contained the following proviso:—"It is hereby agreed and declared by all parties hereto, particularly by the said Isaac Bell, that these presents shall be construed and the rights of all persons claiming thereunder shall be regulated according to the law of Ireland in the same manner as if the said Isaac Bell were now domiciled in Ireland, and as if the said Isaac Bell and Evadne Cane were to remain henceforth during their respective lives domiciled in Ireland."

After his marriage the respondent continued to hold the Mastership of the Kilkenny Hounds, and resided with his wife in the county of Kilkenny, first at the house which he had leased, and afterwards at Kilcreene House, which he purchased in 1917. Petitioner and respondent lived together on affectionate terms, and there were three children of the marriage, only one of whom was surviving at the date of the petition.

On the 13th August, 1921, the respondent, who had gone to England on a short visit, wrote to the petitioner, asking her to meet him at the Shelbourne Hotel, Dublin. At the interview he informed the petitioner that he intended to leave her, as he wished to live with another woman. Mrs. Bell fell ill, and asked her husband to return to her. Some correspondence then took place between the parties, in which the respondent wrote that his intention of leaving the petitioner was irrevocable, and in which he stated his "permanent address" was Queen Anne's Mansions, St. James's Park, London. On the 1st December, 1921, the respondent transferred to the petitioner in the Land Registry his absolute interest in Kilcreene House. The respondent had never taken out naturalization papers.

A sealed copy of the petition, which was issued on the 14th December, 1921, with a citation dated 19th December, 1921, was served personally on the respondent on the 19th December, 1921.

Serjeant Hanna K.C. (with him *P. O'C. White*), for the petitioner:—

There may be a question of jurisdiction in this case. The respondent has never taken out papers of naturalization, but he has never lived in America since he was eight years of age, and since 1902 he has been resident in Ireland, where the marriage took place. The question of domicile was present to the minds of the parties to the marriage, as is plain from the provisions of the marriage settlement executed the day before the marriage. The respondent, from the correspondence and from his statement as to a "permanent address" in London, appears to be endeavouring to acquire a matrimonial domicile in England. It is clear on the evidence that both husband and wife at and after the marriage considered their domicile was in Ireland.

K. B. Div. (*S. I.*) 1922.

BELL *v.* BELL.

In *Parker's Case* (1), the papers in which are here in Court, Mr. Justice Pim gave a decree for the restitution of conjugal rights.

(1) PARKER'S DIVORCE, HOUSE OF LORDS, 13th July and 20th December.

On the 21st January, 1916, the wife, Mrs. Lilian Margaret Aurora Parker, obtained a decree for the restitution of conjugal rights from Pim J., sitting as Matrimonial Judge of the High Court of Justice in Ireland, King's Bench Division. The decree ordered the husband to resume cohabitation with and render conjugal rights to the wife within fourteen days of service. The decree was served on the husband on the 8th February, 1916, but was not obeyed. On the 16th July, 1916, the wife, as petitioner, obtained in the High Court of Justice in Ireland, King's Bench Division, Matrimonial, a decree for divorce from her husband a mensa et thoro, on the ground of the husband's adultery. A Bill of Divorce was promoted by the wife in the House of Lords, and was read for the second time on the 13th July, 1917, and, as amended in Committee, was passed on the 20th December, 1917.

The following extracts are taken from the proceedings as transcribed from the shorthand notes of W. B. Gurney & Sons:—

Mr. Bayford (for the promoter): I am not quite sure, my Lord, whether the question of non-compliance with a decree for restitution of conjugal rights has been dealt with by your Lordships before, but if I might just refer to two matters on that point——

Lord Atkinson: I see under the 4th section of the Act of 1884, in England non-compliance for even a less period than two years may be held to amount to desertion.

Mr. Bayford: Yes, my Lord, by section 5.

Lord Atkinson: I do not know whether it is the same in the Irish Act. Is it?

Mr. Bayford: No, my Lord; and I understand that that was the reason why the decree for the restitution of conjugal rights was not dealt with in the proceedings for divorce in Ireland, because it would not be a ground there.

Lord Atkinson: But you could get the decree you got for divorce a mensa et thoro, on adultery alone.

Mr. Bayford: Yes, my Lord, and it was on that alone that it was granted in this case.

Lord Atkinson: What authority is there for saying that non-compliance for less than two years amounts to desertion in Ireland?

Mr. Bayford: I do not think, my Lord, there is any authority for that particular proposition, but I am going to ask your Lordships to consider the case in 11 Appeal Cases of Westropp's Divorce Bill. There are two short passages there I desire to refer your Lordships to. In one Lord Herschel deals first of all with the facts of that particular case, and at page 297 says: "There appears to have been a precedent in the year 1840 in this House for granting a divorce to a wife upon adultery, cruelty, and bigamy being established. Whatever may have been the case prior to the passing of the Divorce Act of 1857, I think that since the passing of that Act whatever would justify a divorce and afford a legal ground for it, according to the provisions of that Act where that Act prevails [but it did not prevail in Ireland], will afford sufficient ground for an application to the Legislature to grant a divorce in that part of the United Kingdom where the Act does not itself operate"; and Lord Blackburn, dealing with the same point, says thus: "I think the guide that ought to be adopted by the House in such a case is this. I do not say you may not pass Acts upon other occasions also, but this at least you may do: whenever that is proved which in a Court of law in England would be held to be sufficient ground for a divorce, that is sufficient ground for this House to pass a Divorce Bill relating to Ireland, where the Divorce Act does not apply."

Lord Atkinson: That seems to meet the case.

Mr. Bayford: And that was concurred in by Lords Watson, FitzGerald, Halsbury, and Ashbourne.

Lord Atkinson: Is your petition opposed?

Mr. Bayford: No, my Lord; and I ask your Lordships, considering that the provisions of section 5 of the Matrimonial Causes Act, 1884——

Lord Atkinson: In England it is the rule that non-compliance with a decree for restitution of conjugal rights for less than two years may amount to desertion.

The evidence was then heard, and the Bill read a second time.

DODD J. :—

Mr. Serjeant Hanna, with a carefulness which I appreciate, calls my attention at the outset to a possible question of jurisdiction.

The respondent is an American by birth, and has not become a British subject. This, I think, is not material. "To suppose that for a change of domicile there must be a change of natural allegiance is to confound the political and civil status, and to destroy the distinction between patria and domicilium." A man may change his domicile as often as he pleases, but not his allegiance. Domicile of choice is the creation of the party. Exuere patriam is beyond his power: *Udny* v. *Udny* (1).

Had the respondent then acquired an Irish domicile? The facts proved before me establish this beyond a doubt. They are stronger than in any reported case which I can recall. The marriage settlement is cogent evidence. Mr. Cane says it was deliberate. The lawyer who drafted it had the law clearly in his mind: *Santa Teodoro* v. *Santa Teodoro* (2).

As a man may change his domicile, has the respondent, by purporting to do so and going to England, effectively changed it? He cannot do so according to our law, and, I think, also, clearly not according to English law: see *Manning* v. *Manning* (3).

It occurred to me that the wife might have taken advantage of his conduct in so doing, and have instituted a proceeding for the restitution of conjugal rights in England, though the husband could not have taken advantage of his own wrong-doing.

This Court has no jurisdiction to grant a decree for desertion. If the wife brought a petition in England for the restitution of conjugal rights, and got a decree with which the husband refused to comply, she could forthwith present a petition for the dissolution of her marriage on the grounds of adultery coupled with desertion (47 & 48 Vict. c. 68, sect. 5). That Act does not apply to Ireland, and the Irish marriage would not permit her to sue for divorce in the English Court. A decree for restitution is based upon the continuance of conjugal relations, and jurisdiction to dissolve the marriage is not invoked. The decision in *Manning* v. *Manning* (3) would tend to show that bona fide residence in the country in which the husband resides is sufficient in restitution cases. It was a maxim of the Matrimonial Courts that forum sequitur reum. It was a departure from this maxim established by the canon of 1711, owing to the comity of the Courts, that each culprit should answer to his own bishop. It would be a strange procedure that where the spouses are living in England, if the marriage was an Irish marriage, an aggrieved wife should not be entitled to apply to the Court in England for an order that her husband should receive her to his hearth and home there, the place of his residence; still more anomalous if she had to resort to an American Court.

The rules of the House of Lords requiring judicial decision by a Court of first instance would be complied with if the wife could produce a decree for restitution by the English Court, show that the decree had not been complied with, which in England would be desertion, and also produce a decree from the Irish Court, which had alone jurisdiction to

(1) L.R. 1 H.L. 441. (2) L.R. 5 P. Div. 79. (3) L.R. 2 P.D. 223.

K. B. Div. (*S. I.*) 1922.

BELL v. BELL.

Dodd J.

grant a divorce a mensa et thoro. In analogous cases the husband had to produce in England, under the law before the Divorce Act, a judgment of a Common Law Court against the seducer, and also a decree of an Ecclesiastical Court for a divorce a mensa et thoro—two distinct Courts. The practice and rules still require both from an aggrieved Irish husband. That, however, would leave an aggrieved Irish wife whose husband's residence was in Ireland in a less advantageous position than an English wife. She could get no decree founded on a desertion. *Westropp's Divorce Bill* (1) went to establish the proposition that a decree of the Irish Court founded on (*a*) adultery and (*b*) cruelty was sufficient ground for an Act to dissolve the marriage. That has been acted upon ever since (1886). But desertion cannot be pronounced upon by this Court judicially.

The principle laid down by the Lords, however, applies to desertion. Lord Herschell says: "Whatever may have been the case prior to the Divorce Act of 1857, I think since the passing of that Act whatever would justify a divorce, and afford a legal ground for it according to the provisions of that Act where that Act prevails, will afford sufficient ground for an application to the Legislature to grant a divorce in that part of the United Kingdom where the Act does not operate." Lord Blackburn says: "Whenever that is proved which in a Court of law in England would be held to be sufficient ground for a divorce, that is sufficient ground for this House to pass a Divorce Bill relating to Ireland, where the Divorce Act does not apply."

This petition is, I presume, preliminary to a suit for divorce a mensa et thoro presented to me as the Matrimonial Judge. I cannot include desertion as a ground for my decree.

The law imposes on me as Matrimonial Judge the duty of settling the questions for the Judge who is to try the case. It has not hitherto been the practice to include any question relative to desertion. A rather curious thing arose. It is a mere accident of the rota of the King's Bench Judges that I am trying this case. The associate asked me what finding he was to report on a third question which it seems as Matrimonial Judge I had included in the questions sent to be tried by the King's Bench Judge, viz., "Whether the respondent had supplied a house for the petitioner." My order had been to my Registrar in the Matrimonial Court, "The usual questions." When the associate here asked me what finding I was to make upon my own question, all I could say was "ignore it." But I have since, before revising this judgment, had every research made in the office. No trace can be found of where the question came from or how it came to be there. The best conclusion I can come to is that it is a survival of the old ecclesiastical practice, that it was probably inserted by way of mitigation of punishment, or as a basis for a matrimonial separation. The use I make of it is this: I, as Matrimonial Judge, can frame any question that the present state of things may render expedient, though it may not be a ground for relief; and if it is so thought fitting by the Lords in their wisdom, I can replace the antiquated query by one more appropriate, viz. "Whether the respondent has complied with the order for restitution of conjugal rights granted on such and such a day." There would be a finding on that.

(1) 11 A. C. 294.

The Lords in their wisdom might take the finding as a decision of this Court on a question of fact, though this Court could grant no relief upon it. They seem to have acted upon it in the *Parker Divorce Bill* (1), a copy of which has been handed in.

The petitioner is well advised, I make no doubt, and I shall, so far as in my power, give such relief as the Court permits.

I may, perhaps, say that things have changed since the jurisdiction that I exercise was first created. In Ireland, in 1869, such a proceeding could not be brought in a Court of law. The Ecclesiastical Courts had exclusive jurisdiction. The general principles of the Ecclesiastical Law in this respect had been fixed in pre-Reformation times. There were rules of procedure from time to time modified and altered. The general principle was unaffected.

When the Irish Church was disestablished it became necessary to have a Court to take the place of the old Ecclesiastical Courts, and an Act was passed in 1870 for the purpose (33 & 34 Vict. c. 110). Sect. 13 of that Act is as follows:—"In all suits and proceedings the said Court for Matrimonial Causes and Matters shall proceed to act, and to give relief on principles and rules, which, in the opinion of the said Court, shall be conformable to the principles and rules on which the Ecclesiastical Courts of Ireland have heretofore acted and given relief."

I sit as a Judge now under the authority of that Act, as amended by the Judicature Act, and I am bound to inquire into and follow the principles and rules therein referred to.

The principles and rules have come down to us more from the practice in the office than from actual provisions. The text-books of the Ecclesiastical Courts are meagre. One could hardly expect that this question of jurisdiction would have been a subject of judicial decision, and yet there is one authority that is illuminating—I refer to *Cooper* v. *Cooper* (2). It was a suit by the wife against the husband for restitution of conjugal rights. The wife was the "promovent," the husband the "impugnant." He put in what was practically a plea to the jurisdiction. He did so by an affidavit sworn to by him on the 27th March, 1835, "before our Consul at Ostend," the impugnant being described there as "of Brussels." He had eloped in 1832 with a young lady. Her father brought an action of seduction; the wife a suit in the Consistory Court of Dublin. Immediately after the elopement he made preparations for abjuring the realm, surrendered his place in the Isle of Man, and practically lived in his yacht. He said he had not been in Ireland for years except for a day at Kingstown Regatta. "His intent was to live aboard, to avoid all proceedings consequent on his crime." But the Court held that he was "constructively domiciled here"—actually, indeed, as his last domicile was No. 20 Wentworth Place, Dublin.

The impugnant relied upon a canon of 1711. That canon provided that an impugnant was to be tried in his own diocese. He had no diocese. But the Court held that the canon did not apply to persons having no fixed residence, who are called "loose vagabonds." "The law or law-makers never intended in providing that a party should be tried before his own proper and convenient Judge that he should by

(1) Ante, p. 154, note. (2) Milward, 373.

K. B. Div. (S. I.) 1922.

BELL v. BELL.

Dodd J.

going from place to place evade the law altogether and leave the plaintiff remediless."

This—which was in the nature of a venue question—does not arise now. All the jurisdiction of the Courts of the archbishops and bishops in matrimonial matters is now vested in the Judge who tries the case. All Ireland is his diocese. I am "the proper and convenient Judge."

The offence of refusing to comply with an order for restitution of conjugal rights was an ecclesiastical one, and ecclesiastical penalties attached to it—in early times excommunication; later on contumacy. Now, I suppose, it would be contempt. The English decisions seem to suggest that, since 1884, that would not be granted in England. No penalty has been sought for in Ireland, I think, since 1870. A change has taken place in the use of this old procedure. In the ecclesiastical administration the order was intended to be obeyed. It is now sought in the expectation that it will not be obeyed, so as to lay the foundation for other proceedings.

I must administer the law as I find it. The case has been fully proved. I have no doubt about my jurisdiction. I grant the decree as sought, and I make it part of my order that service of this decree on the respondent at the address he has given in England be good service, and, of course, I give the petitioner her costs.

Solicitors for the petitioner: *Casey, Clay, & Collins.*

C. N. K.

RUSSELL AND BAIRD, LTD., *v.* HOBAN (1).
SAME *v.* SAME.

(1921. No. 2067; 1921. No. 3678.)

Appeal.
(*S. I.*)
1921.
Dec. 1, 2.

Sale of goods—Contract—Memorandum in writing—Sale note—Confirmation by contract note—References in subsequent correspondence—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *sect.* 4.

In October, 1920, plaintiffs' traveller, at a business interview with the defendant, gave the latter a sale note of 42 tons of oatmeal subject to the plaintiffs having oatmeal unsold, and offering "six separate deliveries if possible. December and January shipment from mills." This note was not signed by the defendant. Some days later the plaintiffs sent the defendant a contract note confirming the sale note, but with some variation and the insertion of certain conditions, and also an intimation that "if this sale note be retained beyond three days after this date, it will be held to have been accepted by the buyer." In the course of correspondence the plaintiffs wrote altering the deliveries to three. In January, 1921, the defendant wrote to the plaintiffs cancelling "my order for oatmeal"; and subsequently he refused to accept delivery on the ground that he had not signed the sale note, and that there was no completed contract.

Held (reversing Wylie J.), that the sale note and contract note did not constitute a contract between the parties.

Per Dodd J.: There was no memorandum in writing sufficient to satisfy the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), sect. 4.

APPEAL from order of Wylie J. (without a jury) entering judgment for the plaintiffs.

The plaintiffs, merchants in Glasgow, with an Irish office at 32–33 Lower Abbey Street, Dublin, sued the defendant, a trader carrying on business in Castlebar, in two writs for breach of contract. In the first action the claim was for £168 5*s.* 2*d.*, for breach of a contract to accept and pay for 224 bags of 140 lbs. each of medium cut oatmeal at £31 10*s.* per ton. The claim in the second action was for £257 13*s.* for breach of a contract to accept and pay for 448 bags of 140 lbs. each of medium cut oatmeal at £31 10*s.* per ton. Both actions were consolidated. The defence was that the defendant did not enter into any contract, and that even if he did the requirements of sect. 4 of the Sale of Goods Act, 1893, were not complied with, and that there was therefore no contract enforceable by action.

The action was tried before Wylie J., without a jury, on July 1st, 1921. From the evidence it appeared that P. A. Swiss, manager for the plaintiffs, met the defendant in the latter's business premises on October 12th, 1920, and talked to him about buying forward oatmeal. What took place at the interview was described by Swiss as follows:—"Hoban said he would buy 40 tons of medium cut meal at £31 10*s.* a ton. Hoban said he would like if we could manage it that we should deliver in six separate deliveries. I could not promise. I thought only two deliveries were possible, and I told him that. He said if we could not do the six he would take two. I made him the sale subject to the usual confirmation from head office. I wrote out

(1) Before RONAN and O'CONNOR L.JJ., and DODD J.

Appeal. (*S. I.*) 1921.

RUSSELL AND BAIRD *v.* HOBAN.

sale note from order book and handed a carbon copy to Hoban." The sale note was in these terms: "32 Lower Abbey Street, 12/10/20. Subject unsold forty-two tons medium oatmeal (six separate deliveries if possible), £31 10*s.* per ton for Dublin. December and January shipment from mills. Cash orders 7 days from date of invoice." On October 18th the plaintiffs wrote from their Dublin office to the defendant:—"With reference to the order given to our Mr. Swiss, we are to-day in receipt of a cable enabling us to accept same. We have accordingly much pleasure in handing you contract note herewith, and shall be pleased to receive your further offers." The contract note stated:—"We confirm having this day sold you subject to safe arrival about 336/140 lb. jute bags of medium cut oatmeal, £31 10*s.* per ton rails Dublin. December seaboard shipment, 336/140 lb. jute bags of medium cut oatmeal, £31 10*s.* rails Dublin. January seaboard shipment. Terms, net cash in 7 days." The contract note concluded by stating:—"If this sale note be retained beyond three days after this date, it will be held to have been accepted by the buyer."

On November 6th, 1920, plaintiffs wrote to the defendant stating they were in a position to arrange for deliveries in January, February, and March. In December the price of oatmeal began to fall. On January 3rd, 1921, defendant wrote to the plaintiffs as follows:—"Kindly note I wish to cancel any oatmeal you have had on order for me, and much oblige." And on January 10th he wrote: "Kindly cancel my order for oatmeal, which was without signing contract note." Plaintiffs refused to cancel the contract, and forwarded the defendant the invoice for 224 bags, which they subsequently delivered. The defendant refused to accept delivery and returned the invoice. He based his refusal to accept delivery on the ground that he had made no complete contract for the purchase of the oatmeal.

Wylie J., holding that there was a contract and a sufficient memorandum, gave judgment for the plaintiffs for £425 and costs. The defendant now moved that the verdict and judgment for the plaintiffs be set aside, and that judgment be entered for the defendant with costs upon the ground that the learned Judge misdirected himself in holding (*a*) that there was a contract between the plaintiffs and the defendant; (*b*) that there was a memorandum in writing of such contract sufficient to satisfy the Sale of Goods Act, 1893.

Leonard K.C. (with him *E. S. Murphy K.C.* and *Carson*), for the appellant:—

There was no contract between the parties, and, even assuming a contract, there was no memorandum in writing signed by the defendant sufficient to satisfy sect. 4, sub-s. 1, of the Sale of Goods Act, 1893. The contract note was an offer containing the plaintiffs' terms, and was never accepted by the defendant. The retention of the sale note by the defendant beyond the limit of three days did not make a contract. There must be a signed admissson by the party to be charged that there was a contract as well as a signed admission of the terms of the contract. The Sale of Goods Act does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties.

[Authorities cited: *Thirkell* v. *Cambi* (1), *Hussey* v. *Horne-Payne* (2), *Jones* v. *Daniel* (3), *Re the Empire Assurance Corporation* (4), *Dyas* v. *Stafford* (5).]

Babington K.C. (with him *A. V. Matheson*), for the respondents:—

We submit that the transaction between Swiss, the plaintiffs' agent, and the defendant on October 12th amounted to a concluded contract. The terms of that contract were reduced to writing, and they are contained in the contract note of October 18th. The correspondence embodied both the sale note and the contract note, and constituted a sufficient memorandum. Where a contract in writing or note exists, which binds one party, any subsequent note in writing, signed by the other, is sufficient to bind him, provided it contains in itself the terms of the contract, or refers to any writing which contains them: *Dobell* v. *Hutchinson* (6). [Other authorities cited: *Cave* v. *Hastings* (7), *Oliver* v. *Hunting* (8), *Bellamy* v. *Debenham* (9), *Allen* v. *Bennet* (10).]

RONAN L.J.*:—

Notwithstanding the subtle and ingenious points raised by Mr. Babington with great ability, I have come to the conclusion that there was no contract in this case. The materials on which I base my judgment are the documents plus the evidence of Swiss. The latter was a traveller for the plaintiffs, and his business was to go round the country soliciting orders for them. He kept a book which he describes as an "order book"; and his account of the transaction here is: "I met defendant; I talked to him about buying forward oatmeal. Hoban said he would buy forty tons at £31 10*s.* a ton. Hoban said he would like if we could manage it that we should deliver in six separate deliveries. I could not promise; I thought only two deliveries were possible, and I told him that. He said if we could not do six he would take two. I made him the sale subject to the usual confirmation from head office." That is the account from which we are asked to infer that on that occasion a final contract was concluded between Swiss, on behalf of the plaintiffs, and Hoban. Swiss says he made the sale to Hoban "subject to the usual confirmation from head office." Surely, if the man is telling the truth, that is not an unconditional sale. It is only a sale subject to confirmation by head office. As if to make the matter plain, Swiss says: "I wrote out sale note from order book and handed carbon copy to Hoban. I forwarded order to Dublin. When I returned to Dublin I wrote letter of 6th November."

Mr. Babington says if the first document be taken apart from this conversation, and apart from the other documents in the case, there is an absolute contract. It is always open to parties to show that notwithstanding the terms of a document there was, in fact, no

(1) [1919] 2 K. B. 590.
(2) 4 App. Cas. 311.
(3) [1894] 2 Ch. 332.
(4) 40 L. J. Ch 431.
(5) 9 L. R. Ir. 520.
(6) 3 A. & E. 355, at p. 371.
(7) 7 Q. B. D. 125.
(8) 44 Ch. D. 205.
(9) [1891] 1 Ch. 412.
(10) 3 Taunt. 169.

* This judgment has not been revised by the Lord Justice.—ED.

Appeal. (*S. I.*) 1921.

RUSSELL AND BAIRD *v.* HOBAN.

Ronan L.J.

contract. This traveller is supposed to have drawn up in the interest of his employers a contract which would have bound them, but would not have bound the other party. The idea of this man making a contract which would bind his employers and did not bind Hoban is too grotesque for belief.

On October 18th the plaintiffs made their first communication from the head office to Hoban in the following terms: "With reference to the order given to our Mr. Swiss, we are to-day in receipt of a cable enabling us to accept same. We have accordingly much pleasure in handing you contract note herewith, and shall be pleased to receive your further orders." How can it be contended that there was a contract when these people wrote that letter? If they had written, "We hereby accept it," and the order had been signed by Hoban, that would be all right; but no order had been signed by Hoban. All this shows that Swiss never intended the first document to be a contract. The contract note enclosed with the letter of October 18th from the head office used these words: "We confirm having this day sold you subject to safe arrival," etc. That is a complete departure from the terms of the sale note of 12th October. The terms of the original document provided for "December and January shipment from mills" and for "cash orders 7 days from date of invoice." The terms of the contract note are: "December and January seaboard shipments and net cash in seven days." The concluding words of the contract note were: "If this sale note be retained beyond three days after this date, it will be held to have been accepted by the buyer." No man can impose such conditions upon another. The document is conclusive evidence against the parties who sent it, that it was an offer which required acceptance.

In my opinion it is conclusively proved that there was never any contract between the parties; and the judgment of the Court below must be reversed.

O'CONNOR L.J.:—

The first question that arises in this case is, was there a contract at all?

Mr. Babington's argument was ingenious and puzzled me for a while, but in the result my opinion is quite clear on it. He says that in the defendant's shop on the 12th October a contract was concluded, the terms of which are full and express. He further says that the words "subject unsold" do not prevent the transaction from being a contract, though they do make it a contract subject to a condition, and that, that condition being fulfilled, the other terms of the original order of the 12th October were binding on both sides—for he admits that it was not competent for the plaintiffs to make a new contract in varied terms by the letter of the 18th October. Accordingly, I proceed to consider the meaning of the words "subject unsold." In my opinion these words may mean either—1, "provided the vendors have, in fact, goods unsold at their disposal," or 2, that the vendors were to be at liberty to accept or refuse the order when they had an opportunity of considering what stocks they had available. If the first is the true construction, I incline to the opinion that there was no proof

of the fact upon which the condition depended, for a statement by a plaintiff in writing or otherwise is not proof against the defendant of the fact; and further, the statement is not absolute, but hedged in by promises as to their ability to deliver, e.g., safe arrival, no strike, etc. In that view the plaintiffs have failed to prove that the condition was fulfilled. I think, however, that the second of the two constructions is the correct one. I think so on the construction of the form of order, but it is so stated by the other terms. If so, when the plaintiffs elect to accept, they do not do so absolutely but on terms, and the acceptance not being unconditional, there was no contract.

The second question is, assuming a contract, is there any signed memorandum of it? I decline to say anything as to this, for the first point in my judgment disposes of the motion. I think this appeal should be allowed, and the judgment and verdict be entered for defendant.

DODD J.:—

It is of importance to bear in mind the words of the statute. Sect. 4, sub-s. 1, of the Sale of Goods Act, 1893, provides that: "A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf." Swiss does not suggest even in his direct evidence that there was a contract in this case. The plaintiffs sue on a memorandum in writing, but there is no memorandum in accordance with the terms of sect. 4, sub-s. 1, of the Sale of Goods Act. Such a memorandum should contain a recognition of the contract and of its terms: *Thirkell* v. *Cambi* (1). In this case there was no recognition of the contract. In the notes in Chalmers to sect. 4 of the Sale of Goods Act, 1893, it is stated that "The curious refinements resorted to by successive generations of Judges to exempt particular cases from the operation of the statute constitute a strong argument against its policy." The policy of the statute was deliberately designed for the protection of traders, and it ought to be enforced. Here the terms of the contract were not clearly stated in any note or memorandum signed by the defendant; and in these circumstances he cannot be held liable. The plaintiffs' action must therefore be dismissed.

Solicitors for the plaintiffs: *Matheson, Ormsby, & Prentice.*
Solicitor for the defendant: *John J. Smith.*

C. L.

(1) [1919] 2 K. B. 590, at p. 599.

Appeal. (*S. I.*) 1921.

Nov. 8.
Dec. 2.

IN THE MATTER OF THE WORKMEN'S COMPENSATION ACT, 1906, AND IN THE MATTER OF AN AGREEMENT BETWEEN MARIE J. SYRON AND PATRICK KILMARTIN (1).

Workmen's Compensation—Injury occasioned by accident—No weekly payment made or agreed upon—Agreement for payment of lump sum—Registration—Workmen's Compensation Act, 1906 (6 *& 7 Vict. c.* 58), *Schedule II, clause* 9.

A workman, aged twenty-nine years, met with an accident arising out of and in the course of his employment which rendered him totally blind. No weekly payments by way of compensation were fixed by arbitration or agreement; but the employer agreed to pay, and the workman, represented by a solicitor, agreed to accept £300 as a lump sum in full redemption, satisfaction, and discharge of all claims under the Act. The employer also undertook to provide him with board and lodging. A memorandum of the agreement omitting the undertaking as to board and lodging was prepared, and the employer applied to have it recorded. The workman was satisfied that the employer would carry out that undertaking. The County Court Judge refused to record the memorandum on the grounds that as it was not an agreement for the redemption of weekly payments it was not recordable at all; that the amount was inadequate; and that the memorandum did not contain the entire terms of the agreement.

Held (O'Connor L.J. dissenting), that the County Court Judge acted within his discretion in refusing to record the memorandum.

APPEAL by Mrs. Marie J. Syron from an order dated June 10th, 1921, of the County Court Judge of Mayo, refusing to record a memorandum of agreement sent to the Clerk of the Crown and Peace for registration pursuant to paragraph 9 of the second schedule to the Workmen's Compensation Act, 1906.

The respondent, Patrick Kilmartin, was a labourer, aged twenty-nine, in the employment of the appellant, at the average weekly wages of £1 12*s.* 4*d.* Some years ago he had lost the sight of one of his eyes, and whilst working for the appellant he met with an accident which resulted in loss of the sight of the other eye. He was now totally incapacitated for work. No sum by way of weekly compensation had been fixed by agreement or otherwise, and no weekly payments had been made. Under the terms of the memorandum of agreement the appellant agreed to pay a lump sum of £300 "in full redemption, satisfaction, and discharge of all claims and compensation under the Act." In addition she agreed to give the respondent board and lodging in her house for the remainder of his life. This latter provision was not inserted in the memorandum.

Mr. Huggard, solicitor, who appeared for the workman, was satisfied with £300, together with board and lodging. He advised his client "to require this in agreement. Mrs. Syron was willing to put it in, but would not be let."

The County Court Judge found as facts that the agreement was entered into between adults, without fraud or undue influence, that Kilmartin trusted Mrs. Syron as to board and lodging, that he was

(1) Before RONAN and O'CONNOR L. JJ., and DODD J.

blind by reason of accident. The learned Judge held that an agreement for the payment of a lump sum, otherwise than by way of redemption of weekly payments, was not recordable under Schedule II, clause 9, of the Workmen's Compensation Act, 1906. Alternatively he held that the amount of compensation was inadequate. Further, he held that the memorandum was imperfect, inasmuch as it did not contain the terms as to board and lodging, which were part of the agreement.

T. Sullivan K.C. and *Dockrell*, for the appellant:—

We submit that under the words "any other matter decided under this Act . . . by agreement" in Schedule II, clause 9, to the Workmen's Compensation Act, 1906, the memorandum in this case was recordable. It was not open either to the Clerk of the Crown and Peace or to the County Court Judge to inquire into the question of adequacy of compensation. A clause dealing with the board and lodging was not put into the agreement because the legal advisers of the employer thought it was a matter outside and independent of the compensation contemplated by the Act.

[Authorities cited: *Ryan* v. *Hartley* (1), *Rawlings* v. *Hodgson* (2), *Williams* v. *Minister of Munitions* (3), *Park* v. *Hudspith* (4), *Haydock* v. *Goodier* (5).]

The respondent was not represented.

RONAN L.J.:—

On the facts of this case the County Court Judge had, in my opinion, a discretion as to what order he should make. An illiterate blind man, aged twenty-nine, entered into an agreement to accept £300. There was a supplemental term, that he was to be given board and lodging by the employer for life. Mr. Huggard, solicitor for the workman, was satisfied with £300, together with board and lodging, but advised his client "to require this in agreement. Mrs. Syron was willing to put it in, but would not be let." Those facts were brought before the Clerk of the Crown and Peace, who referred the case to the County Court Judge. The question for the Judge was whether he would give additional force to this memorandum by changing it from being a mere agreement between the parties into a contract of record having the effect of a judgment of the County Court. It is plain that if a man in this class had been awarded compensation by way of annuity, and if he agreed to accept in lieu of that annuity a lump sum, which the Court thought inadequate, he would be protected from his own imprudence. I hold that the County Court Judge acted within his discretion in refusing to record the memorandum. The appeal must be dismissed.

(1) [1912] 2 K.B. 150.
(2) 11 B.W.C.C. 73.
(3) 12 B.W.C.C. 213.
(4) 13 B.W.C.C. 289.
(5) [1921] 2 K.B. 384.

Appeal.
(*S. I.*)
1921.

SYRON
v.
KILMARTIN.

O'CONNOR L.J.:—

This case raises three questions, two of them of general importance, and the third arising on the special facts of the case.

The questions are:—1. Where an injured workman, who is sui juris, and his employer agree upon a bulk sum for compensation for the injury—there being no antecedent fixing of the weekly compensation, whether by agreement or otherwise—can the agreement be recorded? 2. Is such an agreement subject to the powers of supervision given by clause 9, proviso (*d*), of the second schedule of the Workmen's Compensation Act, 1906? And 3. In the circumstances of this case, should the County Court Judge have received and recorded the agreement?

As to the first question, the County Court Judge was of opinion that there was no power to record an agreement of the kind in question. During the argument I was disposed to agree with him, but a closer examination of the statute convinces me that he was wrong.

I find the key to this problem in the words "agreement as to the amount of compensation payable to a person under any legal disability" in clause 9, proviso (*d*), of the second schedule in the Act. That clause gives a supervising power to the County Court Judge, on the grounds therein stated, in the following cases:—1. Where there is an agreement for the redemption of a weekly payment. 2. Where there is an agreement as to the amount of compensation payable to a person under any legal disability. 3. Where there is an agreement as to the amount of compensation payable to dependants.

The supervising power is this—there is power to the registrar, if, on any information which he considers sufficient, he considers the amount inadequate, or the agreement obtained by fraud, or undue influence, or other improper means, to refuse to record the agreement, and to refer the matter to the County Court Judge, who may thereupon make such order as he may think just. Now, this clearly assumes an antecedent power to enter into an agreement as to the amount of compensation payable to a person under legal disability, and to record such agreement when entered into. Where, in the statute, do we find such power conferred? We find it in the first part of clause 9 of the second schedule, which runs:—"Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee, or by an arbitrator, or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of Court, by the committee or arbitrator, or by any party interested, to the registrar of the County Court, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a County Court judgment."

It is clear, I think, that the power to agree upon a fixed sum in the case of persons under legal disability, and to record this agreement, is derived from the words I have just quoted, the power proceeding, in my opinion, from the general words:—"Where . . . any other matter (is) decided under this Act, either by a committee, or by an arbitrator, or by agreement." If these general words embrace a power in case of persons under disability, it seems to me clear that they also extend

to a person who is not under disability, there being nothing whatever to limit their application to cases of disability. If so, clause 9, on which counsel for the appellant rests his case, confers a power to record an agreement for payment of a bulk sum where there has been no antecedent ascertainment of a weekly sum.

In coming to this conclusion, I do not leave out of consideration the other provisions of the second schedule, notably clause 10. That clause, in effect, renders nugatory all agreements within proviso (*d*) unless and until they are recorded. An argument may be put thus: in the case of an agreement for the redemption of a weekly payment by a bulk sum, or an agreement as to the amount of compensation payable to a person under legal disability, or to dependants, it must be recorded, and to be recorded must pass the muster of an examination by the registrar, and a possible further examination by the County Court Judge. Is it not therefore strange that the agreement in other cases may be recorded without passing that examination at all? In other words, the workman or persons claiming under him get a protection in the one case which is withheld in the other. It would be sufficient for me to say that, in my judgment, the Legislature has so expressed its will in the statute, possibly conceiving that where the workman is of full age and sui juris, agreements for a lump sum should not be obstructed. The policy of the Act, it is to be noted, is that proceedings shall be invoked only if there is a failure to agree: see sect. 1, sub-s. 3. Other answers may, however, be suggested:— 1. Clearly persons under disability and dependants, for obvious reasons, require special safeguards. 2. Where the weekly sum has been ascertained or agreed upon, it will be a matter of record in the Court, and the Legislature may have thought it right to give the Court a discretion where it is proposed to remove one record and substitute another. 3. Where the weekly sum has itself been the subject of agreement, there seems to be no power of supervision of the agreement by the Court. 4. The effect of the supervision is not, as it seems to me, conclusive, but merely prima facie; the process of recording is, in its nature, ex parte. I am of opinion that, notwithstanding the recording of an agreement of any kind, the transaction could afterwards be reopened up, upon any ground upon which any contract can be reconsidered by a Court of equity.

The exact point raised here does not seem to have been decided; but in the cases in England to which we have been referred— *Rawlings* v. *Hodgson* (1), *Williams* v. *Ministry of Munitions* (2), and *Parker* v. *Hudspith* (3)—the power to record an agreement of this kind seems to have been taken for granted.

The second question that arises upon this appeal is as to whether the County Court Judge has any supervising power over an agreement of this kind. I am of opinion that he has not; his powers, so far as agreements are concerned, are limited to the specific cases mentioned in clause 9, proviso (*d*), to which I have already referred. For instance, he has no supervising power over an agreement fixing a weekly sum.

The third question arises upon the facts of this case. It is said that the agreement sought to be recorded is not the entire agreement,

(1) 11 Butterworth, 73. (2) 12 Butterworth, 213.
(3) 13 Butterworth, 289.

Appeal. (*S. I.*) 1921.

SYRON *v.* KILMARTIN.

O'Connor L.J.

but only part of it. This point is based upon the following words occurring in the request to record the agreement:—"He" (the workman) "is at present living with Mrs. Syron" (the employer) "at above address, and is being supported by her. The intention is for this arrangement to be continued." It is said that this constitutes a contract, that he shall be lodged and supported by Mrs. Syron. I daresay it is evidence of a contract; but where the parties, each represented by a competent and independent legal adviser, put forward as the agreement something which onerates Mrs. Syron with no such liability, I am of opinion that it is not for us to force them to adopt a different attitude. To do so is to claim a supervising power which is not conferred on this or any other Court in a case of this kind. I should perhaps be slow to arrive at this conclusion were it not clearly my opinion that the recording of this agreement gives it no conclusively binding efficacy. Should it transpire that the workman was over-reached, or that the agreement as recorded does not truly represent all the terms arranged and agreed between the parties, the workman is not without a remedy.

DODD J.:—

I base my judgment upon the strong bedrock of the Common Law. The document presented as an agreement is not the agreement entered into between the parties. It leaves out a material part of the agreement actually made. Without going into the matters under the special Acts, and the divergent views of the Lords Justices upon them, I am of opinion I cannot be a party to recording as an agreement what is in fact not the agreement entered into. If I did so, the workman could not enforce the part omitted. If I were asked as a Common Law Judge to make this document a rule of Court, and had the full facts disclosed as in the case stated, I should decline to make it a rule of Court for the reason stated.

In the result, therefore, my judgment goes in aid of the judgment of Lord Justice Ronan, that this document should not be recorded.

Solicitor for the appellant: *M. Good.*

C. L.

JANE WYCHERLY *v.* DENIS FLYNN (1).

High Court of Appeal.
1922.
March 30.
May 1.

Revenue—Income tax—Landlord and tenant—Deduction from rent—Contract—Provision for an option—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *sects.* 73 *and* 103—*Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40)—*All Schedules, Rules, r.* 23.

By lease dated February 1st, 1894, premises were demised by a landlord to a tenant at a yearly rent of £22 "over and above all taxes, rates, charges, and impositions whatsoever (quit rent and Crown rent excepted)." The lease also contained a provision the effect of which was that if the tenant would pay "all rates, taxes, charges, assessments, and impositions of every nature and kind whatsoever assessed upon or payable out of or in respect of said premises by either the landlord or the tenant in respect thereof, whether parliamentary or otherwise, including the whole of the county cess and poor-rate, or any rate struck or levied under the Public Health Acts," the lessor would at all times during the continuance of the demise accept and take from the lessee the yearly rent of £14, instead of the reserved yearly rent of £22. Until 1920 the lessor accepted the rent of £14, and paid landlord's income tax herself. In 1920 the tenant was compelled to pay landlord's income tax, and the landlord refused to accept the reduced rent less income tax. Save in respect of landlord's income tax, the tenant had complied with all the requirements of the provision in the lease.

Held (reversing the Court of Appeal in Southern Ireland), that a unilateral provision for an option such as that in the lease was not "a contract, covenant, or agreement for payment of . . . rent" within the meaning of the Income Tax Acts; that the lessee could obtain the benefit of the option only by complying with all its terms, including the payment of landlord's income tax, and that his right to deduct the tax from the rent could be exercised upon paying the full reserved yearly rent of £22.

APPEAL by the plaintiff from an order dated December 19th, 1921, of the Court of Appeal in Southern Ireland.

The facts are set out at p. 28, ante.

Rearden, for the appellant.

Conner K.C. and *Moloney*, for the respondent.

The arguments were similar to those in the Court below.

SIR JOHN ROSS C.:—

The facts of this case have been accurately stated in the judgment of the King's Bench Division.

The rent reserved in the lease is £22, payable half-yearly. There is nothing to suggest that this is an impossible rent, or an unreal colourable rent, merely inserted for the purpose of evading the law. The lessor had the right to demand it, and the lessee covenanted to pay it; but the lessee had the right to deduct from that rent the amount paid by him in respect of income tax. If there had been any covenant or agreement on the part of the lessee to pay the income tax, it would have been void, and the right to deduct the tax would have been unaffected. There is a provision that if the lessee pays all rates

(1) In the High Court of Appeal, before SIR JOHN ROSS C., ANDREWS L.J., and DODD J.

High Court of Appeal. 1922.

WYCHERLY v. FLYNN.

Sir J. Ross C.

and taxes, including some for which he is not legally liable, and does certain other acts in the lease mentioned, the lessor will accept £14 instead of £22.

The lessee has not bound himself by covenant or agreement to take advantage of this provision. If it is for his interest to do so, he can get the benefit of it, but only by a strict compliance with its terms. The lessor cannot compel him to exercise what is merely an option. If he does not comply with its terms, there is an end of the matter; the parties are remitted to their original position as if the option had never existed at all. But one thing he cannot do, that is, to mix up the two positions, accepting what is for his interest and rejecting what is against it. For these reasons, which seem to me convincing, I am satisfied that the decision of the Court of Appeal is erroneous, and that of the King's Bench Division right.

As I had the advantage beforehand of reading the judgments of my colleagues about to be delivered, I do not find it necessary to discuss the authorities cited, or to go into more elaborate reasons.

ANDREWS L.J.:—

I agree with Ronan L.J. that the lease of 1st February, 1894, must be construed according to the law which was in force at the time that it was made; and the rights of the parties must accordingly be determined by the provisions of the Act of 1842, as amended and extended to Ireland by the Act of 1853.

The general effect of the relevant provisions of these Acts is clear. The Crown was not to be obliged to look further than the occupier for payment (Act of 1842, sect. 63, No. ix, r. 1); but the tenant was entitled by sect. 60, No. iv, r. 9, to be recouped for such payment by deduction from his rent. Sect. 103 renders any contract, covenant, or agreement for payment of the rent in full by the tenant, without allowing such deduction, utterly void.

In considering whether a document such as the lease of 1st February, 1894, offends against either the letter or spirit of the Act, regard must, in my opinion, be had to the document as a whole. If, when so taken and construed, it deprives the tenant of his statutory right of deduction, the contract, covenant, or agreement effecting this result is void. But, in my opinion, when the lease preserves to the tenant this right of deduction from the rent actually reserved by it, the statutory requirements are complied with, and the Act cannot be relied upon for the purpose of modifying or rendering void an entirely independent provision or covenant on the part of the landlord, by which he undertakes that if the lessee performs certain covenants and conditions contained in the lease, makes certain payments, including this tax, and indemnifies the landlord therefrom, he (the landlord) will in consideration thereof accept from his tenant a reduced yearly rent. There is no obligation whatever on the part of the tenant to act upon this clause; and, in my opinion, a unilateral provision of this character for an option is not "a contract, covenant, or agreement for payment of . . . rent" within the statute.

A "covenant for payment of rent" must at least be obligatory upon the lessee who is to make the payment. This clause is in no

way binding on him. It leaves entirely unaffected the statutory right of deduction of the tax from the rent of £22 actually reserved by the lease, which alone he covenants to pay. The lessee may elect to adopt either of two courses. He may either pay the rent of £22 reserved by the lease, and exercise his statutory right of deduction therefrom; or he may pay and satisfy the tax, indemnify the lessor therefrom, and comply with the other obligations mentioned in the clause, in which event he can compel the landlord to accept the reduced annual payment of £14. But the one thing he cannot do is to compel the landlord to accept the reduced rent of £14 less the tax; for this would be in effect to insist upon a second or double deduction.

Gaskell v. *King* (1), which was decided upon sect. 115 of the Act of 1806 (46 Geo. 3, c. 65), has been strongly relied upon by defendant's counsel. It is, in my opinion, a conclusive authority, if such is required, that the covenant for payment of the rent of £22 must be so construed as to permit of a deduction of landlord's property tax therefrom; for the law will in such cases always imply an exception of such taxes as could not legally be paid by the tenant; but the case throws no light upon the construction of the subsequent clause or proviso in the lease upon which this case turns.

One further cogent reason occurs to me in support of the conclusion at which I have arrived. In England the amount of the tax is determined by the rent reserved by the lease, i.e., in the present case it would be determined by the rent of £22. Of course, if the lessee paid this rent to his landlord, it would be reasonable that he should deduct from it the full amount of the tax based thereon; but surely it would be unreasonable and absurd to contend that the lessee who elects to pay his landlord the reduced rent should be entitled to deduct from payment of such reduced rent the full amount of the tax based upon the higher rent. The fact that in Ireland the basic figure for ascertaining the tax is annual value instead of the rent cannot affect the matter, as the provision of sect. 103 of the Act of 1842, which we are called upon to construe, applies with equal force to both countries.

It is, however, strongly contended on behalf of the defendant, following the judgment of Ronan L.J., that a decision in favour of the landlord will open the door in the future to direct evasion of the statute, as all statutory provisions could be got rid of by the simple device of first naming an impossible rent, and then providing that the tenant should not be allowed to deduct the tax from the real rent.

I do not think that it need be feared, nor am I to be taken as admitting that any such result will necessarily follow from our decision in this case. But even if it did follow, I have only to say that it would not be the first time in which the law has recognized the right to do indirectly that which it does not permit to be done directly: *Davies* v. *Fitton* (2); *Colbron* v. *Travers* (3).

For these reasons I am of opinion that the question submitted to us in the special case should be answered in the affirmative, the order of the Court of Appeal for Southern Ireland discharged, and a decree given for the plaintiff for £7.

(1) 11 East, 165. (2) 2 Dr. & W. 225. (3) 12 C.B. N.S. 181.

High Court of Appeal. 1922.

WYCHERLY v. FLYNN.

DODD J.:—

The question for the Court, as framed by Mr. Justice Samuels in the case stated, is: "Whether, under the foregoing circumstances, the defendant is bound to pay the lessor's income tax in order to be entitled to the benefit of the provision for reduction of the rent to £14 per annum?"

The form leaves something to be desired in legal accuracy. It is the cause of some of the entanglements that have arisen, which it is the duty of this Court to disentangle. The defendant was bound to pay the tax. The question is: was he entitled to deduct it from the £14?

The civil bill was brought for £11, half-year's rent due to 1st January, 1920, out of a dwellinghouse and yard, situate at Denroche's Cross, in the City of Cork, on a lease dated 1st February, 1894, from the plaintiffs, two ladies, of Powis Square, Bayswater, London, to the defendant. The yearly rent reserved was £22. The reddendum in the lease is what Mr. Justice Gibson calls in *Bradshaw* v. *MacMullan* (1) "an ambiguous form of contract, not stating who is to pay the rates." There was a covenant to pay that rent of £22 by the defendant, and other strict covenants.

The defendant has paid in this case the income tax payable by the landlord, and was admittedly entitled to a deduction from his rent. The amount of the income tax was £1 16*s*. The defendant lodged £5 4*s*. in Court, which would satisfy the plaintiffs' claim if the rent were only £14, instead of the covenanted rent of £22. The question might be differently put: "Is the landlord disentitled by what Mr. Justice Samuels calls 'the provision for reduction of the rent to £14 per annum' from suing for the rent reserved, £22?"

The form is not immaterial. Some of the fallacies in the arguments, and, with respect, also in the judgments, are due to this: the lease is treated as if all the terms and covenants as to the £22 rent were struck out. But we must start with a legal right to recover £22 unless displaced. It is displaced, it is said, by the covenant added at the end of the lease by the lessors.

Lord Justice Ronan, I think, is clearly right in calling it a covenant, for that is what it is called in the indenture. That it is a covenant touching the land is, I should say, also beyond controversy. The lessors covenant in "the event" mentioned in the covenant to "reduce" the rent to £14. Mr. Rearden pushes his case too far when he says it is not an agreement. I regard the whole document as containing one agreement. The proper way of considering this clause is as a term of the lease. Does it amount to an agreement by the tenant to do the things covered by the "if," or is it a stipulation giving him an option? If he prefers to take the lease as it stands, he can do so, and in that sense Mr. Rearden's argument is apposite. The tenant does not agree to do any of the things covered by the "if."

(*a*) The first "if" is "if the lessee shall observe all the covenants and conditions hereinbefore contained." I pressed Mr. Moloney with intent, but without malice, "Did not that include the covenant to pay the £22 rent?" His reply was, the thing must be construed

(1) [1918] 2 I.R. 486.

sensibly. Just so. It must be found out from within the four corners of the document, as a whole, what the parties are at. What is the common sense of it? Why did they start at £22? What is the answer to that?

(*b*) The next branch of the "if" is, "and also pay and satisfy all rates and charges, assessments and impositions of every nature and kind whatsoever, assessed upon, payable out of, or in respect of the said premises by either the landlord or tenant in respect thereof, whether parliamentary or otherwise, including the whole of the county cess and poor-rate, or any rate struck or levied under the Public Health Acts.

(*c*) "And shall and will construct, at his and their own cost and expense, all the necessary drains and other sanitary works as may be necessary to satisfy, for the time being, the requirements of the sanitary authorities, and will cleanse and keep in good order same during said term.

(*d*) "And from payment of all such rates, taxes, charges, and impositions, and from all liability, fines, penalties, costs, and charges in respect of said sanitary works will, during the said term, save harmless and keep indemnified the lessors therefrom. Then, and in such event (note, in the singular), the lessors will accept £14 in lieu of the £22."

What is the sense of this? What was the intention? If, say the lessors, we are free from all taxes of all kinds, and all law and costs of all kinds, solicitors, valuers, experts, and get a fixed sum per annum, that we can count upon in framing our domestic budget, then we will accept £14. If we are not, we must get our full rent. Lord Justice Ronan says the £22 rent was "an imaginary" rent. The fallacy of his decision lies in that. I interpret the lease quite otherwise. It was the real rent.

The defendants rely on the words "payable by the landlord" as amounting to "an agreement by the tenant for payment of rent." If they do not amount to an "agreement," they are not within the provisions in the 1918 Act, which enacts that "every agreement for payment of interest, rent, or other annual payment in full, without allowing any such deduction, shall be void": Schedule A, No. 8, rules 1, 2; all schedules rules, rule 23. Is this an agreement for the payment of rent?

Is the defendant under an obligation to do any of the things mentioned in the clause by reason of the clause?—some of them he is obliged to do by statute; some of them are statutory obligations upon the landlord. Test it by the part as to the Public Health Acts. Sect. 120 of the Public Health Act of 1878 casts onerous burdens upon the landowner, but permits contracts to be made by which the tenant can relieve the landlord. The law reports are full of decisions as to the true interpretation of such contracts. Do the words here amount to an agreement? Could the lessors sue the tenant upon them for not performing the obligations cast upon the owners by the Acts? The tenant has made no covenant, no contract. He does not even contract to pay the £14. If a declaration were framed for breach of contract to indemnify the lessors, could it be sustained? A judge would be obliged to non-suit the plaintiff. The lessor's sole remedy is to claim his full rent. If

High Court of Appeal. 1922.

WYCHERLY v. FLYNN.

Dodd J.

the lessors here sued (apart from any question as to legal obligation) for not paying the lessors' income tax, they would again be non-suited. There is no contract. The landlord can claim the full rent. That is his sole remedy. If so, there is no agreement within the Act of 1918 or Act of 1842. It is the agreement that is made null and void. It is for enforcing such an agreement the landlord is made answerable to the Criminal Law. There is nothing in the Act making it either unlawful or criminal in the tenant not to claim the deduction. But it is urged this covenant is against the spirit of the Act. It is "an evasion." It is in this connexion that the authorities cited in argument come in, and these seem specially applicable to the particular tax we are dealing with. The case of *Gaskell* v. *King* (1), strenuously relied upon by Mr. Conner, is really against him. These "East" cases are nearly all pleading cases, and need careful scrutiny. The writ was in covenant. The declaration, as the law then was, incorporated the lease. The defendant craved oyer. The reddendum was "clear of all and all manner of parliamentary, parochial, and other taxes, rates, assessments, and deductions whatsoever." The defendant demurred generally; and the question was "whether the covenant for payment by the lessee of the property tax rendered the whole lease void" and precluded the lessor from suing for the rent? One almost wonders how even in those days such a question could be argued. How ran the argument? The covenant in question is interwoven in effect with the covenant for payment of rent, and is in fraud and against the policy of the law. The judgment ran: "The covenant by the lessees for payment of the property tax and for indemnifying the landlord from it is void by the statute, but that will not avoid other independent covenants in the lease which are good, such as that for payment of rent. The covenants are entirely distinct"; Lord Ellenborough. But it is Mr. Justice Le Blanc's judgment that, in the argument of Mr. Conner, is severed from its connexion. It was obviously argued there that the reddendum included parliamentary taxes, and the property tax was a parliamentary tax, and therefore within the prohibition. To this Le Blanc J. said: "It could not have been pretended that the lease would be void, because it reserved the rent clear of all parliamentary taxes, for that must be understood of taxes which the tenant might lawfully covenant to pay in exoneration of his landlord." Bayley J. put it even more strongly. Mr. Conner seems to think the case draws a distinction between a parliamentary tax and a property tax. I think that is, on his alternative argument, that the clause does not necessarily apply to the income tax. The tenant has paid, and is therefore entitled to get the deduction he says from the £14. I find some difficulty in following this argument. In truth, the decision was that the particular covenant in the lease as to the payment of the property tax was bad; the other, as it did not necessarily import illegality, was good. But "landlords' tax" here includes income tax. I think it is too clear for argument that "pay" means "pay without deduction."

One might well ask, has the tenant brought himself within the "if"? Is the part about paying the landlord's taxes severable? It is linked up with an "if" with other contingencies; and is there any

(1) 11 East, 165.

authority to show that you can strike one out of several conditions? The lessors say, "If you do *a*, *b*, *c*, *d*, we will reduce your rent"; can he say, "I will not do *b*," or can he say, "The law does not (i) compel or (ii) permit me to do part of *b*, therefore I have complied with the conditions on which I can claim the reduced rent"? It would be open to argument, at least, that if the words in the middle of the sentence were illegal, the illegality extended to the whole "if." Lord Justice O'Connor seems, if I understand him rightly, to admit that if there were only the one limit, if the tenant will pay the income tax of the lessors, the rent will be reduced to £14; that will destroy the clause, not the lease, and the rent of £22 would stand. Speaking for myself, I think you must take it all in all or not at all. But that is not urged here. Mr. Rearden relies on the collocation of the words, the frame of the clause, to show that there was no agreement, or if there be an agreement, that it is an agreement binding upon the lessors to give the tenant an option, but not binding upon the tenant to exercise the option. If I am right in interpreting the lease and the intention of the lessors, their effort was fruitless. They sought by the clause reducing the rent to avoid trouble as to taxes and costs. They are now in the fifth tribunal, because the tenant has not kept faith. The more serious difficulty—one that occurred almost simultaneously to each member of the Court—is as to whether this might not amount to an evasion of the Act. It is in that connexion that the case of *Davies* v. *Fitton* (1) becomes of importance, and requires more consideration than has been given to it in the Court below. No one could be stronger than Lord St. Leonards in his assertion of the law. The Act there (2 & 3 Wm. 4, c. 119) was as to payment of tithes, but the wording is identical with the income tax prohibition: "From and after the passing of this Act, in all cases where any land shall be let, or set, or demised in Ireland, the lessee or tenant thereof shall hold such land free from the payment of tithes or composition for tithes, and all contracts, covenants, and agreements to the contrary hereof, howsoever made, shall be null and void."

"If a lease," he says, "be granted subject to a gross rent with a collateral covenant by the tenant to pay the tithe rentcharge, that agreement would be void under the statute" (2). He goes on: "But suppose an agreement of this nature. The tenant offers to pay £100 a year rent, and in consideration of the tithe rentcharge an additional sum of £5 a year, and this offer is accepted by the landlord. If this Court were called upon to carry into execution such an agreement, could it refuse to do so? I can certainly see nothing to prevent its doing so. I apprehend that the Court would have no difficulty in so modelling the contract as to make the tenant liable to an entire rent of £105. There is nothing illegal in such a contract, and by so executing it the Court would act according to the spirit of the contract."

If an Equity Judge would do so judicially, is there anything to prevent the parties from so modelling their contracts? A full Court of very eminent Judges applied that principle in *Colbron and Others* v. *Travers* (3). The reddendum of the lease in that case had in brackets these words, "the property or income tax always and alone excepted";

(1) 2 Dr. & W. 225. (2) 2 Dr. & W. 225, at p. 236.
(3) 12 C. B. N. S. 181.

High Court of Appeal. 1922.

WYCHERLY v. FLYNN.

Dodd J.

but having regard to the decision in *Gaskell* v. *King* (1), and the Act of 1842 (5 & 6 Vict. c. 35), sect. 73, the reddendum in the present case is to be "construed" as if those words were expressly inserted. The lease contained another parenthesis. The rent was £340 (reducible to £330 upon the contingency hereinafter in that behalf mentioned), and that contingency was the abolition of the income tax, but to be revived if the tax should be again imposed. The Court was composed of Judges of great eminence—Erle C.J., Willes, Byles, and Keating. The judgment was given by Mr. Justice Willes. He quoted from the judgment of Lord St. Leonards, and applied it; and the Court decided there was nothing in contravention of the statute in the clause for reducing the rent, and re-imposing the old rent, in the event of the property tax being re-imposed. The interlocutory statements of a Judge are often of great weight. They are statements founded upon the knowledge and experience of the Judge. They may be corrected by reported authorities, no doubt; but the knowledge and experience of Judges are the foundation on which all our Common Law rests. The report contains one such of Mr. Justice Byles with reference to the clause for reducing the rent. "This is not, in terms, a contract affecting the payment. It is merely a bargain that in the event of a certain charge coming upon the landlord, the tenant shall pay a larger rent." That would seem to be very much in point.

It is unnecessary to refer to the older authorities on this matter of "evasion." The whole matter has undergone careful consideration by the Privy Council and the House of Lords in comparatively recent decisions. In *Simms* v. *Registrar of Probates* (2), it was dealt with by the Privy Council, Lord Halsbury, Lord Hobhouse, Lord Macnaghten, Lord Morris, Lord Davey, and Lord Robertson. It can be briefly summarized. The deceased covenanted "to pay £200,000 to his children, with interest at 1½ per cent. per annum, the debt being payable at call." He regularly paid the interest, but no portion of the principal. The Succession Duties Act, 1893, of South Australia had a clause, that if a person made a disposition "with intent to evade the payment of duty hereunder," he was chargeable with double duty. The covenant would seem to be an attempt to relieve the covenantor of the burden of the succession duty imposed by the Act. There was much conflict of opinion in the South Australian and Australian Courts. In the arguments before the Privy Council, Haldane Q.C. and Lawson Walton Q.C., for the appellants, contended there was no evidence given or producible to show that it was not a bona fide operative deed, according to its terms. Then Lord Halsbury interposed with one of those interlocutory observations to which I attach so much importance, "The whole question is whether the transaction was colourable or real." The judgment was given by Lord Hobhouse. At p. 334 he says: "It does not appear to their Lordships that an examination of the decisions in which the word 'evade' has been the subject of comment leads to any tangible result. Everybody agrees that the word is capable of being used in two senses: one which suggests underhand dealing, and another which means nothing more than the intentional avoidance of something disagreeable." The

(1) 11 East, 165.

(2) [1900] A. C. 323.

question was whether it was a testamentary or a non-testamentary disposition of property. But, according to the law of the colony, the covenant conferred on the children complete ownership of the debt. If the covenantor had died within three months of executing the deed, duty would have been payable. He survived that period. The Court held there was no "evasion" in the absence of some device or underhand contrivance.

In *Bullivant and Others* v. *The Attorney-General for Australia* (1), the matter came before the House of Lords, and we have the advantage of the opinions of each of the Lords. The action was against the executors of a testator for the testator's evading the law. It came in a curious way before the Lords, as to whether the solicitor for the testator was obliged to produce the notes and records of the instructions of the deceased. Mr. Justice Mathew made the order; the Court of Appeal affirmed it. The solicitor appealed to the Lords. Lord Halsbury comments upon the decision in *Simms* v. *Registrar of Probates* (2), "to which he was a party," and says: "My Lords, it would be an abandonment of the principle which has been held sacred in this country if when a person has done that which in itself may be innocent, you should, simply because you choose to suggest that it was done with the view of evading the payment of a tax, require the witness to disclose the whole of his affairs, and enable the private communications between himself and his solicitor to be displayed to the Court." Lord Davey said: "The fallacy of the Court of Appeal is in treating the statute as if it made the execution of voluntary deeds with or without the intention to put property in such a position as not to incur liability to the tax as being an improper or an illegal act. In my opinion it is nothing of the kind. It is a perfectly legal act." Lord Lindley puts it thus, p. 207: "As I have said, there are two ways of construing the word 'evade': one is that a person may go to a solicitor and ask him how to keep out of an Act of Parliament—how to do something which does not bring him within the scope of it—that is evading in one sense; but there is nothing illegal in it. The other is when he goes to his solicitor and says, 'Tell me how to escape from the consequences of the Act though I am brought within it.'" Lord Shand and Lord Brampton concurred.

There is no evasion here in that sense. We are free to decide the matter on the true construction of the lease. The offence created is a refusal by the landowners to grant a deduction from the rent of the amount of the landlord's income tax paid by the tenant. It is here that the matter of form which I alluded to at the commencement of this judgment comes in. The lessors concede that the tenant is entitled to a deduction from his rent. They say it is from the covenanted rent of £22. The State is not damnified in any way nor the policy of the Act interfered with. The provision must be interpreted so as not to interfere with freedom of contract between landlord and tenant beyond what is prohibited.

The whole scheme of the lease, as I interpret it, would fail if the clause beginning with "if" were held to be an independent agreement. The entire provision as to the £22 rent would be unnecessary and wholly without effect. On that basis the £22 rent could never

(1) [1901] A. C. 196. (2) [1900] A. C. 323.

High Court of Appeal. 1922.

WYCHERLY v. FLYNN.

Dodd J.

become payable. The clause gets a reasonable, and therefore lawful, application by holding, as I do, that it gives the tenant an option, and does not bind him to adopt it. If he thinks it more favourable to him from the legal incidents of the foregoing part of the lease, he can adopt it. Is there anything in the lease compelling him to claim the deduction from either rent? The answer is "no." Is there anything preventing him from claiming it from the £22 rent? The answer is "no." Is there anything to prevent the landlord from refusing it from the £22 rent? The answer is "yes." Is there anything in the lease compelling the landlord to allow the deduction from the reduced rent? The answer is "no." Is there anything to prevent the tenant from claiming it as a deduction from the £14 rent? The answer is "everything."

Having regard to the authorities I have cited, it is clear that a Court in fixing a rent may have regard to the incidence of a tax, and the parties in making a contract as to rent may have regard to it. For some years I acted as a Judge of the Land Commission. I directed my assessor in fixing a fair rent for second or third terms to have regard to the fact that the tenant was not entitled to any deduction for poor rate; it was an outgoing. There were 10,000 cases, and no question was raised.

At a later stage as Matrimonial Judge I had to consider the other side. In fixing alimony for a wife, if she had to pay income tax, my amount might be insufficient. The English Judge has followed that course. An order of the Court is not within the Act; it is not a contract. But if the order is a consent order, the Court holds that the Act applies. It is a contract; that again emphasizes the importance of the form. The analogy I suggested during the argument is not without some weight, though, like all analogies, it cannot be pressed too far. A clause in a mortgage to raise the rate of interest unless paid within a specified period is bad, unenforceable on the principle of penalties. A clause for a higher rate, reducible to a lower rate, followed by an "if," is good.

Take the converse case. If Mr. Bradshaw said to Mr. MacMullan, "I will not insist upon my right to a deduction for poor rate," would he have been committing an offence? If the defendant here said, "I will not insist upon my right to a deduction for your property tax," would he have been committing an offence?

I have indicated that if the lessors had sued on this clause as an agreement, I should as Judge have non-suited them. The criminal proceeding is before the magistrate. If it had been an indictable offence and a bill had been sent up, I should have directed the Grand Jury to throw out the bill.

For these reasons, I think the decision of the King's Bench is right, and that of the majority of the Court of Appeal wrong.

Solicitor for the appellants: *A. Julian.*
Solicitors for the respondent: *J. Stanton & Sons.*

C. L.

IN RE ROBERT GASTON AND SAMUEL GASTON, ARRANGING DEBTORS (1).

Appeal. (*N. I.*) 1922. April 27. May 2.

Bankruptcy—Arrangement not "reasonable and proper to be executed under the direction of the Court"—The Irish Bankrupt and Insolvent Act, 1857 (20 & 21 *Vict. c.* 60), *sect.* 353.

Arranging debtors made a proposal of a composition, which was accepted by the statutory majority of their creditors. The arranging debtors had refused to give certain creditors who opposed the arrangement an inspection of furniture which formed a substantial portion of the estate. No evidence was given of the value of buildings and stock-in-trade, which comprised almost the whole of the rest of the estate, except that of one of the debtors; one of the opposing creditors had offered to buy the buildings for a much larger sum than that at which they were valued in the statement of affairs. There was evidence that the estate generally was undervalued in the statement of affairs.

Held, that the proposal was not "reasonable and proper to be executed under the direction of the Court" within section 353 of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60).

APPEAL by a creditor against an order of the Belfast Local Bankruptcy Court made by the Recorder of Belfast, by which he approved and confirmed a proposal of the arranging debtors for payment of a composition of six shillings in the pound in instalments secured by the promissory notes of the arranging debtors and sureties.

The facts appear sufficiently in the judgment.

J. Pringle, for the appellant:—

This proposal is not fit or proper to be executed under the direction of the Court, because (*a*) the arranging debtors refused the appellant an inspection of furniture, which forms a substantial part of their estate, and they persisted in that refusal after the first private sitting; (*b*) the value of the estate given in the statement of affairs is much less than its real value; the appellant offered and still offers to buy for £5,000 the buildings which in the statement of affairs are valued at £3,804, and there has been no independent valuation of any part of the estate; (*c*) on the valuation given in the statement of affairs the composition proposed is unreasonably small. In any case, the matter ought to be investigated in bankruptcy. [He referred to *Re Molesworth* (2); *Re A.* (3); *Re Walsh* (4); *Re P. W.* (5).]

M'Gonigal K.C., for the arranging debtors:—

The statutory majority of creditors having agreed to accept the proposal, it ought to be approved and confirmed by the Court, unless the conduct of the arranging debtors has been so bad that it would be contrary to public policy to confirm it: *Re E. A. B.* (6); *Re M.* (7). [He also referred to *Re Pelan* (8); *Re A. and B.* (9); *Re Fry* (10).]

(1) Before HENRY C.J. and ANDREWS L.J.

(2) 47 I. L. T. R. 17.
(3) 4 N. I. J. R. 181.
(4) 1 N. I. J. R. 195.
(5) 48 I. L. T. R. 61.
(6) [1902] 1 K. B. 457.
(7) 47 I. L. T. R. 26.
(8) 46 I. L. T. R. 290.
(9) 46 I. L. T. R. 142.
(10) [1913] 2 I. R. 273.

Appeal. (*N. I.*) 1922.

In re GASTON.

ANDREWS L.J. read the judgment of the Court, which was as follows:—

This matter comes before us on an appeal from an order of the Recorder of Belfast, by which he approved of and confirmed the proposal of the arranging debtors for payment of a composition of six shillings in the pound in respect of their unsecured debts, such composition to be payable by four equal instalments at three, six, nine, and twelve months respectively from the date of the confirmation of the proposal by the Court, secured by the joint and several promissory notes of the debtors and solvent sureties.

The debtors carried on business in Portrush as machinery merchants and boarding-house proprietors. The appellant is a creditor for the sum of £304 18s., being the amount of a judgment (with costs) which he recovered in an action for the price of certain machinery sold and delivered by him to the debtors.

The statement of affairs contains the usual list of the names of the unsecured creditors, whose debts amount to £2,177. The largest creditors, however, are the Bank of Ireland, whose debt of £4,092 is secured by equitable mortgage of the deeds of the boarding-house known as Warren House and other property, including certain life policies, the value of the entire security being estimated in the statement of affairs at £4,000. The sole assets of the debtors, apart from such security, are alleged to be stock, valued at £976, movable chattels, consisting principally of furniture, valued at £700, and book debts alleged to amount to £27. These sums added together make a total sum of £1,703 available for payment of dividends on the unsecured debts and costs, leaving an estimated deficiency of £566.

The debtors obtained the requisite statutory majority in support of their proposal, eighteen creditors, whose debts amounted to £1,581, voting in favour of the acceptance of the composition offered, whilst five creditors (including the appellant), whose debts have been proved at £503, voted against the proposal.

In his notice of appeal the appellant intimated his intention to rely upon each of the several alternative grounds mentioned in sect. 353 of the Irish Bankrupt and Insolvent Act, 1857; but at the hearing before us his counsel, Mr. Pringle, very properly confined his argument to a submission that, on the notes of the evidence given before the learned Recorder and contained in the affidavits before us, the debtors' proposal was not reasonable and proper to be executed under the direction of the Court.

Several authorities have been cited to us on both sides; but, whilst the judgments in these cases enunciate clearly the principles upon which the Court should act, the actual decisions are of little assistance, as they all rest, like our decision in the present case, upon their own special facts. Briefly expressed, however, it may be said that as a general rule the Court will confirm the proposal of a creditor who has the support of the necessary statutory majority, and will hold that his proposal is reasonable and proper, unless it be shown by trustworthy evidence that the creditors would get a substantially larger sum if the estate were wound up in bankruptcy, or that the debtor had been guilty of some act of commercial dishonesty (*In re Fry* (1)), or

(1) [1913] 2 I. R. 273.

that there had been bad trading (*Re M., an Arranging Debtor* (1)), or that the facts proved show that the case is one which calls for the fullest investigation and inquiry (*Re Molesworth, a Bankrupt* (2), and *In re A. and B., Arranging Debtors* (3)). This may not be an exhaustive list of all the cases in which the Court may deem that a proposal is not reasonable and proper, but it is at least sufficient to enable us to deal with the present case.

Having given the matter careful consideration, we are of opinion that the order of the Recorder must be reversed. It is clearly a case for the closest investigation and inquiry, and this can only be properly obtained through the machinery of the Bankruptcy Court. There has been obviously a determination on the part of the debtors from the time when they sought the protection of the Court to give as little information as possible to the creditors; and we accept the appellant's statement that he was denied an opportunity of inspecting the furniture unless he first signed a definite offer to purchase it—a wholly unreasonable condition to impose. An application to the Recorder at the first private sitting for such inspection was opposed by the debtors, and refused by the Recorder on the ground that he had no jurisdiction to compel it. The learned Recorder was probably quite right in law in so holding; but why was the appellant's reasonable request refused by the debtors? Why was he expected to make an offer, or to decide whether he would support or oppose the debtors' proposal, in blinkers? Were the other creditors, including those who support the proposal, also denied an opportunity of forming a reliable opinion as to the true value of the premises and chattels? If so, what assistance does their support of the proposal give to the Court? The debtors' attitude creates an atmosphere of grave suspicion; but other uncontradicted facts carry the case still further.

The only evidence as to the value of the disclosed assets is that of Robert Gaston, one of the debtors. No valuer has been invited to inspect and value the assets, or afforded an opportunity of doing so; and this failure or neglect on the part of the debtors to obtain an expert valuation is made all the more remarkable by the fact that the valuation placed by the debtors upon each portion of the assets has been so vigorously challenged from the time of the preliminary meeting of creditors that the debtor, Robert Gaston, is obliged to admit in his affidavit of 6th March that the only question which was raised or discussed either at the preliminary meeting of creditors or at the first or second private sitting was as to the valuation to be put upon the assets disclosed. If Robert Gaston knew that this was the only question, and was satisfied that his valuation was a fair and honest one, why has he not had it confirmed by independent or expert opinion? No doubt, it is alleged by Robert Gaston that an inventory of the stock-in-trade, value at £976, was produced at the preliminary meeting of the creditors, who included an engineer and machinery dealer—a Mr. Joseph Rea—and that such creditors were satisfied with same. But of what weight is the opinion of any expert on value when it is not suggested that he had even an opportunity of seeing the articles whose value he professes to give?

Turning to the furniture, we find that the value placed by the

(1) 47 I. L. T. R. 26. (2) 47 I. L. T. R. 17. (3) 46 I. L. T. R. 142.

Appeal. (*N. I.*) 1922.

In re GASTON.

Andrews L.J.

debtors upon the entire furniture in the debtors' private dwelling-house, Dhu Varren, is £200; and upon that in Warren House, a large boarding-house containing several reception-rooms and upwards of thirty bedrooms, is £500.

The book debts are stated to amount to the purely nominal sum of £27, although it is alleged that the debtor, Robert Gaston, stated to the appellant shortly before protection was sought that he expected to get some large payments in a short time, as a considerable number of accounts were due to him.

Finally, the value placed upon all the buildings and premises is £3,804; and for these the appellant has himself made a firm offer of £5,000.

A consideration of these figures suggests a grave underestimate by the debtors of the value of their assets; and this is confirmed in a most remarkable and conclusive manner by a consideration of the figures set forth in the debtors' balance sheet of exactly one year previously. We are prepared to assume in the debtors' favour that values had fallen appreciably during this intervening period; but no explanation of this character can account for the discrepancy between the figures.

This discrepancy may be best shown by setting out the values in two columns:—

	In Statement of Affairs.	In Balance Sheet, 31st Dec., 1920.
Value of furniture ...	£700	£1,425
Stock-in-trade ...	976	1,145
Machinery, plant, fixtures, fittings, motors, cow ...	Nil	1,876
Premises and buildings ...	3,804	5,500
Total,	£5,480	£9,946

The difference in the figures cannot be explained by reference to trade losses, for these the debtor estimates for the year in question as amounting to only £200; but it is sought to discount from the weight to be attached to the figures in the balance sheet by saying that it was prepared for income tax purposes. This, in our opinion, only makes the debtors' case more difficult, as it is impossible to understand the psychology of the mind which inflates the value of assets in an attempt to minimize income tax liability. In our opinion, the values set out in the balance sheet, having regard to the circumstances in which it was prepared, must be treated as more likely to be undervalues than overvalues of the property mentioned therein.

We have already pointed out that the statement of affairs, containing the extremely conservative valuations referred to, shows assets of £1,703 to discharge unsecured liabilities of £2,269, or a deficiency of only £566, yet the debtors' offer is only a modest six shillings in the pound. This the debtor, Robert Gaston, seeks to justify in his affidavit, sworn on 6th March, by stating that the furniture, valued at £700, must be retained for their boarding-house business, and could not, therefore, be regarded as a liquid asset. He, accordingly, entirely ignores the value of the furniture when making the proposal. Even if this disregard of the value of substantial assets were justifiable,

which in our opinion it is not, the estate would still show more than six shillings in the pound. Further, if the furniture, which in a sense forms the stock-in-trade of a boarding-house, can be entirely ignored by a debtor when offering a composition to his creditors, why cannot the machinery, plant, and ordinary stock of a machinery merchant be likewise disregarded? If they can, then the debtors' assets in the present case available for distribution amongst their creditors would amount to only £27, the estimated value of the book debts. This line of reasoning shows the untenable character of the position which the debtors have taken up. The explanation given of the small composition offered was not before the Recorder, being made for the first time in the affidavit of 6th March of the debtor, Robert Gaston. Had such explanation been before the Recorder, we can scarcely think he would have confirmed the proposal.

In arriving at this conclusion, we have not found it necessary to rely in any way upon the evidence of Mr. Neary as to values. This we have thought the safer course, for it is suggested that, as a former auditor of the debtors' books, to whom a substantial sum is due for fees, his evidence on matters of opinion is not of a wholly disinterested character; but in considering the bona fides of the debtors in making their proposal we have attached very considerable importance to the uncontradicted statement made on oath by Mr. Neary: that since the proceedings commenced Mr. Robert Gaston called on him, and said that any persons who would stand to him he would stand to them. The suggestion contained in such a statement was as clear as it was reprehensible.

All the facts to which we have referred bring this case, in our opinion, clearly within the principles underlying the cases cited, in which the Court refused to confirm the arranging debtors' proposals.

It may be said that in adjudicating the debtors bankrupts we are not only disregarding the opinion of the majority of the creditors—a point with which we have already dealt—but are also interfering with a discretionary order of the learned Recorder. We are fully conscious of the general rule that in cases of this nature the Court of Appeal will not readily overrule the discretion of the Court below: *Ex parte Rogers* (1); but we do not feel bound to apply this general principle in the present case. The notes of the learned Recorder and of the Registrar show clearly that many important matters dealt with in the affidavits filed for the hearing in this Court were not before the Recorder; and from the short and possibly incomplete note which we have of his judgment it would appear that he was under the impression—erroneous, as it seems to us—that he could not overrule the wishes of the statutory majority unless he was affirmatively satisfied of the existence of fraud. In these circumstances, we feel at liberty to give effect to our own clear opinion upon the matter. The order of the Recorder must be reversed and the debtors adjudicated bankrupts. The appellant will have his costs of the hearing before the Recorder and of this appeal out of the estate.

Solicitor for the appellant: *J. Cooper.*
Solicitors for the arranging debtors: *Wheeler & M'Cutcheon.*

M. G. E.

(1) 13 Q. B. D. 438.

Appeal.
(S. I.)
1922.
Jan. 25, 30.
July 12.

BOGGAN *v.* MOTOR UNION INSURANCE CO. (1).

(1920. No. 10,830.)

Insurance policy—Exceptions—Riot or civil commotion—Loss of motor car—Theft by armed men.

The plaintiff insured a motor car with the defendant company against loss or damage by fire, burglary, housebreaking, or theft. An exception in the policy provided that the insurers were not liable for "loss or damage arising during (unless it be proved by the insured that the loss or damage was not occasioned thereby) or in consequence of . . . riot, civil commotion, military or usurped power." While the car was out on hire in Co. Wexford in November, 1920, the owner's chauffeur was held up by three or four armed men, who blindfolded and removed him, and took away the car. According to the evidence, there was no disturbance or civil commotion in the county at the time. The police had, however, been called in from a few outlying stations; motor cars had been "commandeered" and not returned, and receipts given in three cases; a post office motor cycle had been taken; there had been some raids for shot-guns and for mails; and early in January, 1921, martial law was proclaimed in the county.

Held (O'Connor L.J. dissenting), that what occurred was not a riot within the meaning of the policy; that it was simply a theft with violence.

This was a motion by way of appeal from the whole of the findings, verdict, and judgment of Molony C.J., made and given in the action on November 25th, 1921, for an order that the same be reversed in their entirety, and that in lieu thereof judgment be ordered to be entered for the defendants, or, alternatively, that a new trial of the action be ordered. The grounds of the application were that the findings and verdict were against evidence and the weight of evidence, and that the learned Chief Justice had misdirected himself in holding that the facts proved did not amount to a riot or civil commotion within the meaning of the policy of insurance upon which the action was brought.

The action was brought by the plaintiff, Thomas Boggan, to recover from the defendants, the Motor Union Insurance Company, Limited, £300 payable under a policy of insurance effected on July 2nd, 1920, in respect of a motor car. Under the policy the defendants agreed to indemnify the plaintiff for loss of or damage to the car by fire, burglary, housebreaking, or theft. One of the exceptions, C, not covered by the policy was: "Loss or damage arising during (unless it be proved by the insured that the loss or damage was not occasioned thereby) or in consequence of earthquake, war, invasion, riot, civil commotion, military or usurped power." The substantial defence of the company was that the loss of the plaintiff's motor car by theft came within the exception.

The action was tried before Molony C.J. without a jury on November 25th, 1921. The plaintiff was a hackney motor-car owner

(1) Before Ronan and O'Connor L.JJ., and Dodd J.

in Wexford. On November 7th, 1920, he hired out a car to a man to take him to a dance at Duncormick, some miles distant, and when on the road the car was stopped by four men armed with revolvers. These men took the car away, and it had not been recovered by the plaintiff. The evidence given for the plaintiff was as follows:—"Thomas Boggan said: On Sunday, 7th November, I was out driving a car myself, when I received a message that another car was wanted to Duncormick. I went and told Meyler, the chauffeur. The car was hired about 6.35, and left about 6.47. Meyler came back at 11.45 and informed me that the car was taken. Up to that my cars were in constant use and never interfered with, and there has been no trouble since. I reported the matter to the R.I.C. that night. There was no disturbance then in Wexford. There were no restrictions as to the use of cars." In cross-examination he said that Ford's did not give a complete set of tools with a car. Patrick Meyler, the plaintiff's motor driver, stated:—"When we got to Katescross, going round the bend of the road, when I was travelling at a good speed, three or four men appeared across the road, each of them armed with a revolver. They used some word which I could not catch. One came over and asked me where I was going to. I told him I was bringing the man alongside me to Duncormick. He told us to get out of the car. He then brought us up the road about twenty or thirty yards. He told me he was taking the car from me. I was then blindfolded and brought across the land to an outhouse. I was told to sit down. I was kept there three and a half to four hours. They took my permit. I was blindfolded again. They brought me to a different road and let me go. Two men stayed with me the entire time. There was no disturbance or civil commotion at that time. In March, 1921, there was. In January, 1921, Wexford was proclaimed." Sergeant John White, R.I.C., said:—"On the 7th November, 1920, there was no serious disturbance in the county. The police had not at that time been called in except from a few outlying stations. There was no martial law till the 4th of January, 1921. No arson cases in Wexford at that time or at any time. On a few occasions—about four—cars had been commandeered and not returned, and receipts given in three cases." In cross-examination he stated that a post office motor cycle was taken and not recovered, and that there had been some raids for sporting guns and for mails.

The defendants called no evidence. Mr. Battersby K.C., for the defendants, contended that the case came within exception C of the exceptions stated in the policy, and that consequently the loss was not covered. He argued, 1, that the four armed men constituted a riot; 2, that the loss arose during the riot; 3, that the loss was occasioned by the riot; and, 4, that the onus of showing that the loss was not occasioned by the riot lay on the insured, and that he had not discharged such onus. In his report the Chief Justice said: "With some hesitation, I came to the conclusion that the case was one of theft, and that the mere fact of the theft having been committed by four armed men acting in concert did not make it a riot within the meaning of the policy. On Mr. Battersby's argument the policy would not cover any case of robbery which was committed by three or more men." He gave judgment for the plaintiff for £220 and costs.

Appeal. (*S. I.*) 1922.

BOGGAN v. MOTOR UNION INSUR. CO.

T. S. F. Battersby K.C. (with him *James Henry*), for the defendants:—

The loss of the motor car was during or in consequence of either riot or civil commotion, or both combined. "Riot" has had a legal definition from the time of 1 Hawkins, c. 65, as being a tumultuous disturbance of the peace by three or more persons assembled with intent to assist one another against any opposition to the execution of their private enterprise, and who execute the same violently to the terror of the people. See also 2 Chit., Cr. Law, 487. This definition received judicial sanction in *Field* v. *Receiver of Metropolitan Police* (1), and it should be presumed that insurance companies in framing their policies had that definition before them.

The facts in this case are clearly within the definition:—Four armed men terrorised a chauffeur into stopping his car, assaulted him, imprisoned him, and thus created a riot: *Reg.* v. *Langford* (2). During that riot, and in consequence of it—that, is as the result of it or because of it—the loss, that is, the taking of the car, occurred.

"Civil commotion" was authoritatively defined by Lord Mansfield in *Langdale* v. *Mason* (3) as an insurrection of the people for general purposes, and that definition was adopted in *The London & Plate Glass Co.* v. *Heath* (4). That there was an insurrectionary movement at this time in Southern Ireland is, unhappily irrefutable, and that it existed in Co. Wexford is proved by the evidence of stolen and "commandeered" cars, post office bicycles, compulsory closing of police barracks, and the proclaiming of the county within a brief period after the theft of the car, which was itself a "constituent element" of the civil commotion: *Cooper* v. *General Accident Insurance Co.* (5). The insurers are, therefore, entitled to succeed under either branch.

Devitt (with him *Swayne K.C.*), for the plaintiff:—

The elements of a riot or civil commotion did not exist in this case. In order to succeed, the insurers must show that there was a tumultuous assembly, and that during or in consequence of a riot caused by that assembly the car was stolen. Such a case is not supported by the evidence, which merely proves robbery by three or four armed men.

Henry, in reply.

RONAN L.J.:—

This case has stood over for a considerable time, because we were informed that *Cooper* v. *General Accident Assurance Co.* (6) would probably come before the House of Lords in the present month; but as there seems to be no hope that the appeal in the Lords will be heard this month, we thought Mr. Battersby's request for judgment in this case ought to be complied with. *Cooper's Case* (6) deals with one aspect of this case, and that is the question of civil commotion. As Mr. Battersby pointed out, it does not deal at all with the question of riot.

(1) [1907] 2 K. B. 853.
(2) Car. & M. 602.
(3) 2 Park on Insurance, 8th ed., 965.
(4) [1913] 3 K. B. 411.
(5) Ante, p. 51.
(6) Ante, p. 38.

Before dealing with the law of the case, I think it right to refer shortly to the facts as they appear in the Judge's report. [His Lordship read the evidence.]

The defendants called no evidence. Mr. Battersby contended that the case came within exception C of the exceptions stated in the policy, and that consequently the loss was not covered. He argued: 1, that the four armed men constituted a riot; 2, that the loss arose during the riot; 3, that the loss was occasioned by the riot; and, 4, that the onus of showing that the loss was not occasioned by the riot lay on the insured, and that he had not discharged such onus. The Chief Justice says:—"With some hesitation I came to the conclusion that the case was one of theft, and that the mere fact of the theft having been committed by four armed men acting in concert did not make it a riot within the meaning of the policy. On Mr. Battersby's argument, the policy would not cover any case of robbery which was committed by three or more men. I therefore gave judgment for the plaintiff."

Two questions arise in the case, and they arise on the policy. The policy provides that "the company will, subject to the terms, exceptions, and conditions contained herein or endorsed hereon, indemnify the insured against loss, damage, or liability as hereunder mentioned actually occurring during the period above set forth or during any period for which the company may accept payment for the renewal of this policy." The insurance included: 1, loss of or damage to any vehicle by accident; and, 2, loss of or damage to any vehicle by "fire, burglary, housebreaking, or theft." Prima facie the case is within the latter clause, and the question is whether it is taken out of it by exception C of the exceptions. The words of that exception are: "Loss or damage arising during (unless it be proved by the insured that the loss or damage was not caused thereby) or in consequence of earthquake, war, invasion, riot, civil commotion, military or usurped power." The burden is on the defendants to prove that the case is within the main part of the clause; but once it was proved that the theft took place during or in consequence of a riot the burden would lie on the plaintiff to prove what is in the parenthesis, namely, that the loss or damage was not occasioned thereby.

Speaking for myself, I am prepared to assume for the purposes of the case that the essentials of a riot, as laid down in the judgment of Phillimore J. in *Field* v. *Receiver of Metropolitan Police* (1), relied upon by Mr. Battersby, are: 1, number of persons, three at least; 2, common purpose; 3, execution or inception of the common purpose; 4, an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; 5, force or violence not merely used in, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. I will go further, and assume that if an indictment for riot had been preferred against the perpetrators of this outrage it would have been the duty of the Judge to tell the jury that the transaction amounted to riot.

(1) [1907] 2 K. B. 853, at p. 860.

Appeal. (*S. I.*) 1922.

BOGGAN *v.* MOTOR UNION INSUR. CO.

Ronan L.J.

Policies of this kind have to be construed under some general rule of construction. Mr. Justice Dodd has favoured me with a very full analysis of the authorities on this question; and he has called my attention to some American cases. American cases do not, of course, bind this Court. If the view of the Judges here does not agree with the American judgments, it is their duty not to follow them; but, at the same time, great respect must be paid to the opinions of distinguished American Judges. In one of these American cases, *Spring Garden Insurance Co.* v. *Imperial Tobacco Co.* (1), I find a very elaborate and careful judgment by Mr. Justice Carroll. He says: "In the construction of policies the same rule obtains as does in the construction of other contracts, with the exception that a policy will be construed in favour of the insured so as not to defeat, without plain necessity, his claim to the indemnity which in taking the insurance it was his object to secure; and where the words are fairly susceptible of two interpretations, that which will sustain his claim and cover the loss must by preference be adopted. It may also be said that ambiguities and words, sentences, or clauses of doubtful meaning, will be construed against the insurer, and this for the reason, so often declared, that the companies themselves prepare the policies with great care and deliberation; and as the insured has no election except to accept them as prepared and presented to him, it is fair that they should be construed most strongly against the insurer and most liberally in favour of the insured, so that the purpose for which the insurance was obtained may be effectuated if this can be done without doing violence to the contract."

The language of the exception in the policy before us is very remarkable. It is not loss caused by riot or civil commotion. It is loss or damage arising "during" or "in consequence of" riot or civil commotion. To my mind these words point to the view that there is or has been a riot, as distinguished from the specific burglary, housebreaking, or theft. In the present case there was no such riot. The riot sought to be established consisted exclusively of the theft or robbery with violence.

I was very much impressed at first by the American case above mentioned. There is a difference between that case and the present case. In that case the insurance was against "all direct loss or damage caused by fire," and by one of the exceptions "loss caused directly or indirectly by an invasion, insurrection, riot, civil war, or commotion," etc., was excluded. The facts were put very specifically in issue, because the case was tried on demurrer. In that case we find it laid down that:—"A riot exists when a body of 100 or more men assemble and confederate to destroy the property of an individual, and in pursuance of that conspiracy to destroy it, at the same time overawing and terrorising the inhabitants and the civil authorities of the locality." Those facts do not bear the slightest resemblance to the present case. Mr. Justice Carroll says:—"Two questions are presented for our consideration: First, was the fire that produced the loss caused by 'riot'? Second, if this be admitted, do the conditions in the policies relieve the companies from liability for loss thus caused? Taking up these questions in the order named, we will first determine

(1) 136 American State Reports, 164.

whether or not the fire was caused by 'riot'; and in considering this question the facts stated in the answers to which demurrers were sustained must be taken as true, so that, accepting these facts as true, do they constitute a 'riot' within the meaning of the term as used in the policies?" The facts stated were that all the property in question was destroyed "by reason of an invasion, riot, and commotion, and usurped power" within the true intent and meaning of the condition contained in the policies. A body of men, about 100 or more in number, armed and disguised, invaded the City of Princeton, Kentucky, and destroyed all the property described in the petition. The riot having preceded the burning of the plaintiff's property, the Court on those facts found that the loss was caused by riot.

That case has no application to the exception in the present policy. Mr. Justice Carroll says:—"As the riot was the direct cause of the fire, the next question is: Did the policies relieve the companies from liability? In the consideration of this feature of the case it must be kept in mind that the policies only insured against direct loss or damage caused by fire. Loss or damage from any other cause, except lightning, was not insured against. The contract of insurance did not undertake to protect the insured against loss by riot or invasion or insurrection or civil war, or military or usurped power, or by order of any civil authority, or by theft, so that the words 'except as hereinafter provided' following the words 'against all direct loss or damage by fire,' if they are to have any meaning at all, or are to have any effect whatever, must exempt the companies from loss by fire 'caused directly or indirectly by an invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority.'" It seems to me that that judgment has no bearing on the peculiar facts of this case.

In dealing with this case we must consider whether the robbery occurred during a riot, or whether we must take clause 2 and exception C together, and read clause 2 as "loss or damage by burglary, housebreaking, or theft, except where such burglary, housebreaking, or theft constitutes a riot in law." That seems to me to be inconsistent with the policy as a whole. The meaning of the policy seems to be that if, while a riot is in progress, or, if there has been a riot, and in consequence of it, a theft takes place, the company is free; but the mere fact that the crime of theft itself contains elements of riot at law does not exclude the right of the insured under the policy. In that case every robbery for which on indictment the accused could technically be convicted also for riot would be outside the policy.

What is the duty of the Court of Appeal in reference to a question of law of this kind? We must be satisfied that the decision of the Court below was wrong. In *Montgomerie & Co., Ltd.*, v. *Wallace James* (1), Davy L.J. deals with the matter thus: "In every case the appellant assumes the burden of showing that the judgment appealed from is wrong, and when it depends on an estimate of probabilities or inferences so nicely balanced that it is impossible to say that a decision either way would be wrong, every material fact having received due consideration, your Lordships would, I make no doubt, be disposed to affirm the concurrent decision of the Courts below."

(1) [1904] A. C. 73, at p. 83.

Appeal. (*S. I.*) 1922.

BOGGAN v. MOTOR UNION INSUR. CO.

Ronan L.J.

In *Vernon* v. *Wright* (1) Lord Wensleydale says: "I hold that you ought not to reverse a careful and elaborate decision of the Court below unless you are satisfied that it is wrong." In this case I am not only satisfied that the Chief Justice was not wrong, but I entirely concur in the view he took.

The second question in the case is that of civil commotion. I have read the evidence, and it seems to me to establish clearly that there was no civil commotion. In his report the Chief Justice did not refer to civil commotion at all; and Mr. Battersby, with that absolute fairness which always characterizes him, told us that in the Court below he rested his case mainly on riot, but that he raised the point about civil commotion; and I have no doubt he did.

As to civil commotion, we have the advantage of the judgment of the Lord Chancellor (Sir John Ross) in *Cooper* v. *General Accident Assurance Corporation* (2). He says: "Two theories are put forward. The plaintiff contends that it was an ordinary case of robbery, where the thief takes the car to sell it, or to keep it for his personal use. The defendants contend that the taking of the car must be considered in the light of the surrounding circumstances; that it is an incident in the working of an existing belligerent system, and that the purpose and intention of the takers are of the utmost importance." In the Court of Appeal in Southern Ireland O'Connor L.J. said: "In my judgment, as a matter of law, if this car was taken by insurrectionists and as part of the insurrectionary campaign, the loss to the plaintiff would have been caused by civil commotion." That view was confirmed in the High Court of Appeal by the Lord Chancellor, who, having stated that purpose and intention were of the utmost importance, goes on to say: "I cannot help thinking, with great respect to them all, that the attention of the learned Judges who have dealt with this case was too much occupied in considering the question of onus. A question of onus may be sometimes of immense importance, as, for instance, in an action for damages for malicious prosecution, where the plaintiff must produce evidence to satisfy the Judge that it is inconsistent with the existence of reasonable and probable cause before he can get to the jury at all. But in a case of this kind, where the facts are not in dispute, and where everything depends on the inferences to be drawn from the facts, there is little advantage in discussing the question of onus."

I confess I cannot understand these observations. They must, I think, as Mr. Justice Dodd has suggested to me, be regarded as dicta. Lord Campbell reminds us, in *Attorney-General* v. *Dean and Canons of Windsor* (3), that dicta are to be treated with respect, but followed only so far as agreeable to sound sense and prior authorities. Ross C. adds: "The judicial mind derives a certain amount of comfort and satisfaction in arriving at a doubtful conclusion by throwing the onus argument into the scale. The truth is that the facts will support either of the two antagonistic conclusions—if to an equal degree, the question of onus is all-important, because if the facts are equally consistent with the two adverse conclusions, the party on whom the onus lies must fail. The question here is one of

(1) 7 H. L. C. 35, at p. 66. (2) [1922] 2 I. R. 38, at p. 47.
(3) 8 H. L. C., at p. 392.

a balance of probabilities, and the scale is to be turned by a correct conclusion founded on circumstantial evidence." But once the balance inclines to one side the question must be left to the jury; the fact must be proved, and the probability must be such as to satisfy the tribunal of fact.

On this branch of the case I will only say, speaking for myself, that my own knowledge of the state of the country, my knowledge of Wexford, being absolutely nil, I am unable to say whether it is more probable that these men took the car in order to sell it than that they captured it as part of an insurrectionary system. I cannot come to the conclusion that the Chief Justice was wrong in not being satisfied that the taking of the car was part of a belligerent system; and on this branch of the case I agree with his decision.

There is one other matter on which I should like to say a word. In judging a question of this kind in Ireland in the present day, probability depends largely upon the place where and the time when the incident happened. In a matter of this kind there is a loose way of talking. Everybody knowing anything about the country knows that different persons have different means of knowledge. The Lord Chancellor refers to the rarity of the crime of motor-stealing before the period of disorder. There is not one scrap of evidence of that in *Cooper's Case* (1) or in this case. In the course of his judgment in *Cooper's Case* (1), O'Connor L.J. says that while acting as law officer he never came across a single instance of motor-stealing; but, on the other hand, Mr. Justice Dodd told us that at Green Street he had tried several such cases. If one Judge happens to have had some special experience, and another Judge happens not to have had that experience, is it seriously contended that the judgment of the Judge at the trial is to be reversed because of some Judge's personal knowledge of facts which were not brought before either of the Courts below? I really know nothing myself about Wexford. I do not read the newspapers carefully, or remember what I read; I have nothing to guide me in this case except the evidence on which the Chief Justice acted; and on that evidence I am not satisfied that the car was taken as part of an insurrectionary system.

For these reasons I am of opinion that the judgment of the Chief Justice should be affirmed.

O'CONNOR L.J.:—

I regret that I am obliged to differ from my colleagues. The Chief Justice seems to have thought that there was no riot. The *Queen* v. *Solely* (2), approved by Palles C.B. in *R.* (*Sheehan*) v. *Tipperary Justices* (3), shows clearly that the occurrence amounted to a riot, and whether it was a riot in the thoroughfare of a city or in a remote part of the country seems to me to be immaterial. It is also immaterial whether it was a riot caused by 100 persons, as in the American case referred to by Lord Justice Ronan, or a riot consisting of only four persons. It was equally a riot in both cases. In the American case a riotous mob or assembly attacked buildings and set fire to them, and the insurance being against fire, with an exception where it was

(1) [1922] 2 I. R. 38. (2) 11 Mod. R. 100. (3) 3 N. I. J. R. 121.

Appeal. (*S. I.*) 1922.

BOGGAN *v.* MOTOR UNION INSUR. CO.

O'Connor L.J.

caused by riot, the Court held that the case came within the exception. I am of opinion that the decision in that case would have been just the same if the words had been not "caused by" but "in consequence of" a riot; and I cannot follow Lord Justice Ronan when he says that because the word "during" precedes "in consequence of," the latter words are merely limited to a question of time, and have no reference to causation. I am of opinion that the true meaning and scope of this policy is that where the arm of the ordinary law is paralysed by commotion, disturbance, or riot, the insurers are not liable for theft by armed men. Of course, I say nothing as to a theft or burglary effected by several armed men; there may be such, perhaps, without being a riot, because the terror populi might be absent.

Although I do not base my judgment on civil commotion, I wish to say one or two words on that question. There was a great deal of argument upon it, and some loose observations were made by witnesses to the effect that there was no civil commotion at the time. I wonder what those witnesses would designate civil commotion. No civil commotion at a time when the police had been forced from some of the outlying barracks! no civil commotion at a time when cars were being commandeered and receipts given for them! The ordinary burglar or thief does not give receipts for motor cars. Matters had not, indeed, come to a head; martial law had not been proclaimed; but the outbreak of civil commotion and the proclamation of martial law do not usually synchronize. Civil commotion did prevail in Wexford when armed men gagged the driver of the car in question here and took it away. I am perfectly satisfied that there was civil commotion; but whether the occurrence was occasioned by it or not I express no opinion, though I should have had no doubt if I had been the Judge of first instance.

In *Cooper's Case* (1) the King's Bench Division and Ronan L.J. came to the same conclusion as Moore J. The High Court of Appeal and I were of a different opinion. This case seems to me to be stronger in favour of the insurance company than *Cooper's Case* (1). For these reasons I think the appeal ought to be allowed.

DODD J.:—

The action comes before us on an application to set aside a verdict and judgment given by the Lord Chief Justice of Ireland, sitting without a jury, on Friday, the 25th of November, 1921. I prefer to deal with it in the first instance as an ordinary application, to be decided upon its merits, leaving the other graver issues raised for consideration later on.

The statement of claim sets forth a policy of insurance, dated the 2nd of July, 1920, by which the defendants agreed to indemnify the plaintiff against loss or damage to a Ford motor car by fire, burglary, housebreaking, or theft, and avers that the motor car was stolen on the 7th of November, 1920, from the plaintiff.

The defence that is now the only one of importance is in these words—paragraph 7. The defendants say that the said policy contained a clause "agreeing that the said policy did not cover loss or

(1) Ante, p. 38.

damage arising during or in consequence of (inter alia) war, riot, civil commotion, military or usurped power," and that the loss of the car came within the same exception.

The learned Chief Justice decided as a question of fact that the theft did not come within the exception "civil commotion," and as a question of law that the mere fact of the theft having been committed by four armed men did not make it "a riot" within the meaning of the policy. Both findings are challenged. The question for us is: are we to set aside either or both? The defendants called no evidence.

The plaintiff deposed that he was a motor car owner in Wexford, and in the month of November, 1920, had four motor cars for hire. On the 7th November a man went to his garage for a motor car to take him to a dance at Duncormick. It was Sunday. The witness was out driving a car himself. When he received a message that another car was wanted to Duncormick, he sent his chauffeur, Meyler. The car was hired about 6.35, and left about 6.47. The witness then said: "Up to that time my cars were in constant use, and never interfered with. There was no disturbance then in Wexford." He was cross-examined as to the tools that Ford's give with their car, but he was not cross-examined as to his statement that there was no disturbance then in Wexford, nor as to the use of his four motor cars.

The second witness was Patrick Meyler, the chauffeur. He said: "I started between 6.45 and 7. When we got to Katescross, going round the bend of the road, when I was travelling at a good speed, three or four men appeared across the road, each of them armed with a revolver. They used some word which I could not catch. One came over, and asked me where I was going to. I told him I was bringing the man alongside me to Duncormick. He told us to get out of the car. He then brought us up the road, about twenty or thirty yards. He told me he was taking the car from me. I was then blindfolded, and brought across the land to an out-house. I was told to sit down. I was kept there three and a half to four hours. They took my permit. They brought me to a different road, and let me go. The men stayed with me the entire time. There was no disturbance or civil commotion at that time." It does not appear what became of the hirer of the car, or whether he was in time for the dance. "In January, 1921, Wexford was proclaimed." Cross-examined—I was driving twenty-five miles an hour. I was three minutes out of the car before I was blindfolded. He was not cross-examined as to civil commotion, or as to riot. He was not asked whether he or the passenger in the car was ever in terror.

Sergeant John White, of the R.I.C., was examined. He had been in Wexford for fourteen years. On the 7th of November, 1920, there was no serious disturbance in the county. The police had not at that time been called in except from a few outlying stations. There was no martial law till the 4th of January, 1921. No arson cases in Wexford at that time, or at any time. On a few occasions about four cars had been commandeered and not returned, and receipts given in three cases. Cross-examined—"Post office motor cycle was taken and not recovered. There had been some raids for sporting guns and for mails." No further details were sought for as to time, place, or circumstance. No evidence was called for the defendants.

Appeal. (*S. 1.*) 1922.

BOGGAN *v.* MOTOR UNION INSUR. CO.

Dodd J.

Upon the evidence of the witnesses, if the Judge believed them, civil commotion was not only not proved, but was negatived.

But Mr. Battersby flings down *Cooper's Case* (1), says that we are bound by that authority, and must find that the theft was caused by civil commotion. That brings me once again to Lord Haldane's speech in *G. C. Krelinger* v. *New Patagonia Meat & Cold Storage Co., Ltd.* (2). I quote from page 40: "To follow previous authorities, so far as they lay down principles, is essential if the law is to be preserved from becoming unsettled and vague. In this respect the previous decisions of a Court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours than in systems where the paramount authority is that of a code. But when a previous case has not laid down any new principle, but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account. To look for anything except the principle established or recognized by previous decisions is really to weaken, and not to strengthen, the importance of precedent. The consideration of cases which turn upon particular facts may often be useful, but it can rarely yield authoritative guidance." To a Court of superior jurisdiction, we must pay even more respect.

There are some observations of the Lord Chancellor which would seem to suggest that probability is proof. But again he sets the matter on a basis quite in accordance with the former law, and I cannot think he meant to lay down new law.

It becomes my duty, therefore, to examine with care the judgments in *Cooper's Case* (1), "to look for the principle established or recognized by the decision." "Established" points to new law; "recognized," to existing law. Did the High Court purport to, or did it in fact, lay down new law? The Lord Chancellor, in referring to what he calls the interesting judgment of Mr. Justice Pim, does seem to set aside the principle adopted by that Judge when he speaks of "coercive evidence and the elimination of any explanation other than the act of a hostile force."

Mr. Justice Pim's statement was his own way of putting what had been put by eminent Judges passim through our reports, and was based upon the principle that a fact may be proved by direct evidence or by excluding any other reasonable hypothesis, save the one suggested, what Bacon calls "the proper exclusion and rejection." The Lord Chancellor's decision is not in conflict with this principle. He finds the evidence "irresistible." I do not regard this as laying down new law. He does seem to say that the law of evidence is different in a civil Court from what it is in a criminal Court. That would be new law. But he immediately qualifies his statement by alluding "to the greater degree of certainty" required in a criminal Court. So qualified the law is not new law.

I think I am right, therefore, in saying that the error of the King's Bench Judges and of Lord Justice Ronan was in the wrong application of established legal principles to the facts of that particular case.

(1) [1922] 2 I. R. 38. (2) [1914] A. C. 25.

It would not be to edification for me to go through the evidence in each of the two cases by way of comparison. I content myself with this. The Lord Chancellor goes through the facts with minute care, and sums up thus: "Some of these elements by themselves may seem to be of little weight, but all taken together lead one irresistibly to the conclusion that this was the work of the organization that was operating through the country." "The facts all taken together." It was a decision on facts. It is loyalty and not disloyalty to the High Court of Appeal to be careful to see that their judgment is not pushed beyond its legitimate limit. While this Court owes a special duty to the superior Court, it owes also a comity to the Court of first instance. I quote from the judgment of Lord Justice Andrews at p. 56: "If the disputed findings were the findings of a jury, or if they were the findings of a Judge upon specific and definite but controverted matters of fact, this Court would not, in my opinion, be justified in interfering with those findings, especially as they met with the approval of five of the six Judges before whom the case subsequently came." We have here special findings upon specific and definite and uncontroverted matters of fact by the Lord Chief Justice of Ireland.

Bearing in mind all these considerations, I am of opinion that the verdict and judgment of the Lord Chief Justice upon the issue of civil commotion was right, and should stand confirmed.

It is essential, whatever view a Judge should entertain of his own, or may I say retain, that all our Courts should join together in the harmonious administration of the law.

The second part of the judgment of the Lord Chief Justice that is challenged is in these words:—"With some hesitation, I came to the conclusion that the case was one of theft, and that the mere fact of the theft having been committed by four armed men acting in concert did not make it a riot within the meaning of the policy. On Mr. Battersby's argument the policy would not cover any case of robbery committed by three or four men." That brings us to the true construction of the policy. Mr. Battersby relies upon a passage in Bunyon. The authority relied upon is *Field* v. *Receiver of Metropolitan Police* (1). That judgment is a masterpiece. The two learned Judges took enormous trouble. They set out the authorities they had consulted. They make a little library. And the Judges conveniently analyze the necessary elements of proof of a riot. They are five in number. I find I entered them in my working copy of Archbold at the time, and I found them of enormous assistance; but I had then had thirty-six years' experience of riots in Ireland, first as counsel for the defence, then for the prosecution, and then as Judge. I hope I shall not startle Mr. Battersby when I say that on the facts as they stand, no such case of riot as that now relied upon arose during all those years. If depositions containing only the facts before us now had been submitted, a Judge would have had some strong observations upon Crown counsel sending up a bill for riot, would have encouraged the Grand Jury to throw it out, and would not have prevented the jury from finding a verdict of not guilty. The Judge would have told the Grand Jury "riot is a tumultuous dis-

(1) [1907] 2 K. B. 853.

Appeal. (*S. I.*) 1922.

BOGGAN *v.* MOTOR UNION INSUR. CO.

Dodd J.

turbance of the peace by three or more persons who assemble together of their own authority with an intent mutually to assist one another in the execution of an enterprise of a private nature, and afterwards actually execute the same in a violent and turbulent manner to the terror of the people. You cannot have less than three. It takes at least three to make a tumult; but it does not necessarily follow that more than three are tumultuous or violent or turbulent. In some cases the terror of one may be equivalent to the terror of the people. And whether that was the case here is again for you. I give you the five elements set out by eminent Judges to assist you; but the quality of the entire transaction is for you."

If I were sitting as a tribunal of fact, I should require much more evidence than there is here to satisfy me that there was a riot. This is the evidence: An unarmed driver of a motor car, accompanied by an unarmed fare, going to a dance on a Sunday evening, was travelling at a good speed going round the bend of the road; three or four men appeared across the road, each of them armed with a revolver. They used some word, not caught by the witness. One came over "and asked me where I was going to. I told him I was bringing the man alongside me to Duncormick, where I was going to. He told us to get out of the car." They got out, and the men took the car. There was a blindfolding after the theft, and a detention of the driver by two men. But was there a riot within the definition of the learned Judges? The learned Judges held there was no riot in *Field's Case* (1).

I do not, however, rest my judgment upon whether there was evidence upon which the culprits could have been convicted or not. That was not the ground of the Chief Justice's decision. It rests upon the construction of the contract.

The insurers have what they call a comprehensive policy. It is for common use in the United Kingdom, and was apparently made before the increased risks arising from the state of things in Ireland were taken into consideration. The insurance company are entitled to rely on that. But so also is the insured, and we must treat it as such. The insurers agree to indemnify the insurer for a Ford motor car for private hire against loss, damage, or liability by fire, burglary, housebreaking, or theft. If that clause stood alone, the company would be clearly liable. But then come what are called "exceptions." I leave out the parenthesis for a moment. "Except loss or damage arising during or in consequence of earthquake, war, invasion, riot, civil commotion, military or usurped power." It is not well to rely too strongly on the collocation of the words, merely on the word "riot" being interposed between "invasion" and "civil commotion." But it is of moment that it is an exception in a policy of insurance, something abnormal in the way of risk, as petrol on the premises in a fire policy, or the liability to fire in a flax mill, which leads to an increased premium. And apart from the mere order, it being included as a category of "earthquake, war, invasion, civil commotion, military or usurped power," does give a clue to the interpretation to be put upon the word. It has nothing to do with criminal law. The subtleties of lawyers, and the points that might be made either in the

(1) [1907] 2 K. B. 853.

prosecution or defence of a man or men accused in a criminal court are entirely irrelevant. The word must find its meaning from the insurance standpoint of increased risk. It points to a condition of things in the body politic, some risk ejusdem generis with war, invasion, or civil commotion altering the normal risk—a tumultuous and violent disturbance of the peace in a local area—such as the Bristol riots, the Gordon riots, the Porteous riots, the Belfast riots, the Derry riots, the Bantry riots; such a state of things as would lead, if prolonged, to a reading of the Riot Act analogous to the general disturbance by invasion, or war, or civil commotion, military and usurped power, but not intended to apply to what was merely an incident in an ordinary theft. It points to something aliunde the theft itself. And this is what the Chief Justice had in mind. Every word in the "exception" and the parenthesis confirms this interpretation—"arise during a riot," "in consequence of a riot," "occasioned thereby." All of these words point to a thief taking advantage of a state of riot to carry out an independent operation on his own behalf. Can it really be intended that if two armed men steal the car with threats and menaces, the insurance company must pay; if a third is added, the insured must bear the loss?

The contract must be construed as a whole, and on the facts of this particular case I am of opinion that what occurred was not within the contemplation of the parties a "riot"; or, if it can be brought within the word, the loss did not arise "during" or "in consequence of" the riot, nor was it "occasioned" thereby.

I desire to add that my decision is uninfluenced by any question as to the onus of proof. I have been influenced by the consideration that if the insured owners of motor cars are not protected against risk such as this the premiums have been flung away. All Mr. Battersby has to do is to say the loss occurred in Ireland and ask for judgment.

I am therefore of opinion that the Chief Justice's ruling on this point also must be upheld, and that his judgment on the whole case be confirmed, and this application be dismissed with costs.

Solicitors for the plaintiff: *Huggard & Brennan.*
Solicitors for the defendants: *O'Neill & Collins.*

O. L.

Appeal.
(S. I.)
1922.
July 26.

In re MARY KEANE, A Bankrupt (1).

Bankruptcy—Practice—Irish Bankrupt and Insolvent Act, 1857, sect. 271—Discretion of Judge—Order to elect—Order for possession.

The order for possession mentioned in section 271 of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), is consequential upon the order to the assignees to elect. Although the Bankruptcy Judge has a discretion, yet, upon the assignees electing not to take the premises of a bankrupt, there is a prima facie duty upon the Judge to make the order for possession unless good reason is shown to the contrary.

Interlocutory Appeal from an order of Pim J., sitting in Bankruptcy, dated 14th July, 1922, refusing the landlord of certain premises an order for possession under sect. 271 of the Irish Bankrupt and Insolvent Act, 1857.

Mary Keane was adjudicated a bankrupt on 3rd October, 1921, and at her examination on 5th and 12th November, 1921, her assets were revealed to be only £2,000 and her liabilities £10,000, incurred in the course of three years' trading as a butcher. On 23rd August, 1920, she had entered into an agreement of tenancy with one Hazlett Wilson in respect of a house and premises, Edenvale, Conyngham Road, North Circular Road. The agreement was as follows:—

"1. I agree to take these premises on lease for one year from 1st October, 1920, at £110, payable half-yearly in advance, I to pay all taxes.

"2. During that period I am to lay out £300 at least on permanent improvements and repairs, such to be approved of by Mr. Wilson.

"3. Until 1st November, 1921, I am to have an option to buy entire premises overleaf for £3,000.

"4. If sale closed before 1st November, 1921, I to get credit for rent of £110 in respect of such period as may not have elapsed.

"5. On other hand, I to pay rent for such period after 1st October, 1921, as I may occupy premises for.

"6. If I do not elect to buy these, Mr. Wilson to refund me one moiety of such moneys as may be spent in repairs, such moiety not to exceed £150.

"7. If I do not elect to buy these, I am to give up clear possession to Mr. Wilson not later than 1st November, 1921, but to have no further claim against him.

"8. All outgoings and all receipts to be apportioned between Mr. Wilson and myself so that I may be only liable for outgoings and entitled to receipts in respect of the actual period of my possession.

"9. I undertake to pay all Mr. Wilson's law costs in connexion with the agreement and giving effect to the terms thereof.

"Mary Keane."

(1) In the Court of Appeal in Southern Ireland, before Ronan and O'Connor L.JJ., and Wylie J.

Appeal. (*S. I.*) 1922.

In re KEANE.

The option to purchase not having been exercised, and the landlord being anxious to regain possession of the premises, a notice of motion under sect. 271 of the Irish Bankrupt and Insolvent Act, 1857, was served on 3rd January, 1922, for the usual order that the assignees should elect to take or not to take the premises; and in the event of their not electing to take, for an order for possession. The motion was adjourned on several occasions, and finally, on 24th February, an order was made which, by a misunderstanding, dealt only with the election, and was silent as to giving up possession. The mistake was discovered; and upon the assignees stating, on 15th March, that they elected not to take, counsel for the landlord applied to the Judge to extend the order of 24th February by including an order for possession; but this Pim J. refused to do. A notice of motion was accordingly served on 10th April, and heard on 14th July, asking for an order that the bankrupt and her assignees should give up possession of the premises to the landlord. In the meantime, on 9th March, the official assignee had entered into an agreement with one John Mithofsky, a friend of the bankrupt, in these terms:—

"In the matter of Mary Keane, bankrupt. I hereby propose to purchase from the assignees in this matter all the household furniture and effects the property of the bankrupt in and upon the premises Edenvale, Conyngham Road (less excepted articles to which the bankrupt is entitled), for the sum of £625 (six hundred and twenty-five pounds), and to accept delivery of same as and where they stand.

"It is understood that the assignees will elect not to take any interest in the premises, so that the tenancy will revert to the bankrupt, and that they, the assignees, will discharge the rent and rates payable out of the said premises apportioned down to date.

"I lodge herewith the sum of £156 5*s*., being one-fourth of the proposed purchase-money, and I undertake to pay the balance immediately upon confirmation of this proposal by the Court.

"I hereby submit to the jurisdiction of the Judge in bankruptcy all questions that may arise with regard to this proposal and the purchase thereunder, if confirmed by the Court, and I agree to this being made a rule of Court at any time.

"Dated this 9th day of March, 1922.—JOHN MITHOFSKY."

"To the assignees in the above matter."

"I recommend confirmation of this proposal by the Court.— A. G. HOLLINSHEAD, O.A."

PIM J. refused to make an order for possession, with costs.

A. F. Blood K.C., for the landlord (appellant):—

The Judge has a discretion under section 271 of the Bankruptcy Act, but in this case he has proceeded on a wrong principle in refusing the relief to which the landlord is prima facie entitled, when no good cause to the contrary has been shown. The Bankruptcy Judge should ascertain whether the landlord by his conduct has disentitled himself to the relief claimed. The section is intended for the benefit of landlords: *Ex parte Vardy* (1); and the order for possession should be made, as a matter of course, where the assignees elect not

(1) 3 M. D. & De G. 340.

Appeal. (*S. I.*) 1922.

In re KEANE.

to take unless some good reason for not doing so is shown. This has always been the practice. Nothing was alleged against the landlord at the hearing.

In the case of *In re Coleman* (1), Pim J. has already held that it is not fair to remit the landlord to his remedy by ejectment in the Common Law Courts, and made an order for possession in favour of a landlord applicant.

Lardner K.C., for the assignees (respondents):—

Under the section the Judge has a discretion. It is clear that an order for possession is not the necessary consequence of electing not to take. The discretion of the Bankruptcy Judge should be exercised in favour of creditors, unless he thereby does an injustice to the landlord. That is not this case. The applicant's real object is to avoid ejectment proceedings elsewhere, because of difficulties in his way under the Increase of Rent Act.

RONAN L.J.*:—

This case seems to me to be a very simple one. We have a tenancy for one year from the 1st October, 1920. We have an option to purchase which may be exercised until the 1st November, 1921, that is to say, for one month longer than the term of the tenancy. We have a provision that if the option is accepted and the sale carried out, the tenant is to get credit for the rent in respect of such period as may not have elapsed The tenant is to lay out £300 at least in permanent improvements. If she does not elect to buy the premises, half of the money spent in repairs (but not to exceed £150) is to be refunded. If the tenant does not elect to buy, she is to give up clear possession to Mr. Wilson, not later than the 1st November, 1921, and to have no further claim against him. How a person holding under that agreement, who has refused to exercise the option, can have any interest in the premises I fail to see. That being so, the landlord of the premises, who is entitled either to have his premises or to get his rent, applies for an order under sect. 271 of the Irish Bankrupt and Insolvent Act, 1857, for possession of the premises.

The interest of a tenant may be a valuable one, or it may not. If it be a valuable one, the assignees in bankruptcy may elect to take it. If not, they may elect not to take it; and the right and duty of election depend on whether there is a valuable interest or not. In this case there was not a valuable interest, and, accordingly, when called upon they declined to take it. The landlord is thereupon left with a bankrupt tenant on his hands. What does the statute provide? That where a landlord has a bankrupt tenant he may come into Court and ask the Court to compel the assignees to elect; and the statute also provides that "any person entitled to such rent . . . shall be entitled to apply to the Court, and the Court may order them to elect, and may order the lessees or the bankrupt or insolvent to deliver up . . . the lease, in case they shall decline the same, and the possession of the premises, or may make such other order

(1) [1917] 2 I. R. 56.

* Not revised by L.J.

therein as it shall think fit." "May order them to elect," that is, where they refuse. If ever there was a jurisdiction that ought to be exercised—unless there were grounds shown for not exercising it—it is under these words "may order them to elect." "May" may be read as "shall." The intention of the Act is that the landlord should have—to use the vernacular language employed in the course of the argument—his money or marbles. He is entitled to have a solvent tenant, to be freed from a bankrupt, and the assignees substituted for him, or to get back his premises. "May order the lessees to deliver up." The "may" in this clause is of the same effect as the "may" in the earlier part of the section, and is consequential on it.

This agreement between the assignees and Mr. John Mithofsky is a very peculiar document. I am quite satisfied, as Mr. Blood and Mr. Lardner have agreed, that it is the basis on which the Bankruptcy Judge refused to make the obvious order in this case. This lady had certain furniture and effects in the house Edenvale, Conyngham Road. It was the duty of the assignees to get the best price possible for that furniture. The second clause of the agreement, however, is a very curious one, for it states that "it is understood"—it would have been much better if it ran, "the assignees hereby agree not to elect to take any interest in the premises"; but that would be too plain a pill to swallow. Accordingly, the modified expression "it is understood" is adopted. "It is understood that the assignees will elect not to take any interest in the premises, so that the tenancy will revert to the bankrupt, and that they the assignees will discharge the rent and rates out of the said premises apportioned down to date," so that the landlord will be left with the bankrupt tenant, the very thing the section is designed to prevent. That agreement—to which the landlord is not a party—affords no justification for depriving him of his ordinary rights under the statute.

I agree with Mr. Lardner that this is a discretionary order, but it is a discretion to be exercised in a reasonable and not a capricious way. Furthermore, there is a prima facie duty to make the orders mentioned in the section unless some reasonable cause is shown for not doing so. There has been no such reasonable cause shown in this case.

O'CONNOR L.J.:—I agree.

WYLIE J.—I also concur.

Solicitor for the landlord (appellant): *J. R. Cresswell.*
Solicitors for the assignees (respondents): *Hayes & Son.*

H. J. M'C.

K. B. Div. (*N. I.*) 1922.

COMMISSIONER OF VALUATION, APPELLANT; ANDERSON, RESPONDENT.

June 22.

Valuation—(15 & 16 *Vict. c.* 63, *s.* 11)—*Appeal to Quarter Sessions*—*Evidence*—*Valuation of houses in neighbourhood.*

The Court of Quarter Sessions in fixing the valuation of buildings in an appeal from the Commissioner of Valuation should not have regard to the valuation of other buildings in the neighbourhood. *Commissioner of Valuation* v. *Galvin* (unreported, Q.B.D., 5th June, 1899) applied.

CASE STATED under statute 23 Vict. c. 4, s. 10, by the Recorder of Belfast.

A lease of a certain shop was in 1921 granted to the respondent, who improved the premises, at the cost of £6,000. The valuation of the premises at the date of the lease was £115; after the improvements were made the premises were revalued, and the valuation was fixed by the Commissioner of Valuation at £380. The respondent appealed against this valuation to Quarter Sessions; the Recorder of Belfast fixed the valuation at £360, but stated a case. The Recorder found that £380 fairly represented the yearly rent at which the premises might be expected to let within the Valuation Act, 1852 (15 & 16 Vict. c. 63), sect. 11; that, as compared with the existing valuation of similar buildings in the district, a valuation of £380 would be disproportionate and excessive, and held that he was bound to fix the valuation, so that it should be as far as possible proportionate to and uniform with the existing valuations on the list, and he accordingly fixed it at £360.

Davison, for the appellant:—

It has been decided by the Queen's Bench in an unreported case that in fixing the valuation of houses or buildings, no regard is to be had to the valuation of neighbouring houses or buildings: *Commissioner of Valuation*, appellant; *Galvin*, respondent; heard on 5th June, 1899.

Robb K.C. and *Fox*, for the respondent.

HENRY C.J.:—

We have before us a judgment of the Queen's Bench Division (Palles C.B., Johnson and Murphy JJ.) given so far back as 5th June, 1899, which the learned Recorder had not before him. It is absolutely on all fours with the case here. Mr. Timothy Galvin, occupier of the Bay View Hotel, Waterville, Co. Kerry, appealed against an order fixing the rateable value of his premises at £80, the question of law for the consideration of the Court being:—"Whether, having arrived

at the conclusion that the valuation of £80 was not too high absolutely, that is, with regard to the valuation of the other buildings in the neighbourhood, the learned chairman was justified in reducing the valuation so as to make it uniform and proportionate with the valuations of other buildings of the same class in the same rating area."

It is obvious the case is on all fours. It is precisely the case that is submitted here. "The case submitting that if this question be answered in the affirmative, the valuation of £50, as fixed by the chairman, is to stand. If in the negative, the valuation of £80 is to be restored. And the Court having heard and determined the question of law arising thereon: It is considered and adjudged by the Queen's Bench Division now here that the question submitted by the said case be answered in the negative. The valuation of £80 to be restored."

We are bound to follow that decision, and accordingly our answer to the question put by the learned Recorder is "No"; and the result of that is that the valuation is to be fixed at £380.

WILSON J. concurred.

Solicitor for the appellant: *Solicitor to the Ministry of Finance.*
Solicitors for the respondent: *R. Kelly & Son.*

M. G. E.

Wilson J.
1922.

June 13, 28.

IN THE MATTER OF THE ESTATE DUTY PAYABLE ON THE PROPERTY PASSING ON THE DEATH OF GEORGIANA DUNBAR-BULLER.

Revenue—Estate duty—Rate of duty—57 & 58 Vict. c. 30, s. 4; 63 Vict. c. 7, s. 12, sub-s. 2—Aggregation of properties—Settled property—Tenant for life exercising general power of appointment.

D. died in 1875, leaving a will whereby he settled certain estates to the use of B. for life, remainder to the use of her children, remainder to such uses as she should by will appoint; and in default of appointment, to the use of H. for life, with remainders over. B. died without issue in 1921, leaving a will by which she exercised the power of appointment given by the will of D.

Held, that for the purpose of determining the rate of estate duty payable on the property passing on the death of B., the property over which B. had the power of appointment was to be aggregated with the other property passing on her death.

George Dunbar died on 12th August, 1875, having by his will dated 26th September, 1872, settled certain freehold estates to the use of the said Georgiana Dunbar-Buller for her life, and after her death to the use of her first and other sons in tail male, with remainder to the use of her daughters as therein mentioned, with remainder in default of issue to such uses as the said Georgiana Dunbar-Buller should by will expressly referring to said power appoint; and in default of appointment to the use of Rev. Wm. Haughton for life, with divers remainders over.

Georgiana Dunbar-Buller died in 1920 having had no issue. By her will dated 24th January, 1907, she exercised the power of appointment given by the will of George Dunbar, by appointing portion of the estates to her husband, Charles Dunbar-Buller, for life with remainders over, and the remaining portion to the trustees of her will on trust to sell and stand possessed of the proceeds of sale as part of her residuary estate.

The Ministry of Finance claimed that for the purpose of determining the rate at which estate duty was payable, the property over which Georgiana Dunbar-Buller had a general power of appointment under the will of George Dunbar was to be aggregated with the other property passing on her death, and had made an assessment on that basis. The executors and trustees of the will of Georgiana Dunbar-Buller presented a petition for a declaration that that assessment was erroneous.

Robb K.C. and *Pringle K.C.*, for the petitioners:—

The statutes dealing with aggregation of estates for the purpose of estate duty are Finance Act, 1894 (57 & 58 Vict. c. 30), sect. 4; Finance Act, 1900, sect. 12, sub-s. 2; Finance Act, 1907, sect. 16.

To form an estate by itself, four conditions are imposed by the Act of 1900, sect. 12, sub-s. 2. The property must 1, be settled property; 2, pass on the death of a person dying after a date which is now 19th April, 1907; 3, pass under a disposition made by a person dying before 1st August, 1894; and 4, such property would, if the dispenser

had died after 1st August, 1894, have been liable to estate duty. No question arises as to 2 and 4 of these conditions, but the Crown allege that the property settled by George Dunbar's will, and appointed by Mrs. Dunbar-Buller's will, was at her death not settled property, and that it did not pass at her death under a disposition made by a person dying before 1st August, 1894, i.e., did not at all pass under George Dunbar's will, but solely under Mrs. Dunbar-Buller's will.

The Finance Act, 1894, defines "settled property" as property comprised in a settlement: sect. 22 (h); and "settlement" means (sect. 22 (i)) any instrument which is a settlement within sect. 2 of the Settled Land Act, 1882. These properties under George Dunbar's will stood limited after the death of Mrs. Dunbar-Buller to her issue, if she had any, and if she had not, to the Rev. Wm. Haughton for life with remainders over, such life interest and remainders being, however, liable to be defeated by an appointment by Mrs. Dunbar-Buller, which, in fact, she made; but either way the properties were limited to persons in succession, and the properties were "settled properties."

They also passed under George Dunbar's will. Both points were considered in the case of Augusta E. Magan. On the point as to whether the property passed under George Dunbar's will, *Magan's Case* (1) is an express decision in our favour. On the point whether the property was settled, our case is different from *Magan's Case* (1), where on the facts that decision was in favour of the Crown. There Augusta E. Magan had both the life estate and the remainder in fee in default of appointment; here the life estate is in Mrs. Dunbar-Buller, and the remainder is to Rev. Wm. Haughton for life, with remainders over. The properties were in our case limited to persons in succession.

The Crown in the correspondence refer to *O'Grady* v. *Wilmot* (2) and *In re Gordon and Adams' Contract* (3). But *Wilmot* v. *O'Grady* (2) deals only with the special law by which property subject to a general power of appointment can be made assets for payment of the debts of a donee who exercises the power; and the speeches of the Lords show the difficulty of finding a theoretical basis for that rule of law. That case has no application to the Estate Duty code. In the speech of Lord Sumner he recognizes the metaphysical point made by Palles C.B. in *Magan's Case* (1). *Gordon and Adams' Contract* (3) is a Settled Land Act case dealing, not with the moment of death, but with the position years afterwards; in any event it is not in pari materia.

Megaw K.C. and *Davison*, for the Ministry of Finance.

Estate duty is to be assessed on the aggregated value of all the estates passing on the death of Georgiana Buller. The property over which she had a general power of appointment ceased to be settled property as soon as that power was exercised, and it passed, within the Finance Acts, under her will, not under the will of George Dunbar: *In re Gordon and Adams' Contract* (3). They also referred to *O'Grady* v. *Wilmot* (2); *Jackson* v. *Commissioner of Stamps* (4); *Wernher* v. *Beit* (5); *Thynne* v. *Stewart* (6).

(1) [1908] unreported. See footnote, post, p. 208.
(2) [1916] 2 A. C. 231.
(3) [1914] 1 Ch. 110.
(4) [1903] A. C. 350.
(5) [1918] 2 Ch. 82.
(6) 111 L. T. 153.

Wilson J. 1922.

In re Dunbar-Buller.

Wilson J.:—

This is a petition by Charles Wm. Dunbar-Buller to have it declared that the property which passed, by reason of the exercise of the general power of appointment given to Georgiana A. E. Dunbar-Buller under the will dated 26th September, 1872, to her father, George Dunbar, who died on 12th August, 1875, should not be aggregated with the property of Georgiana Dunbar-Buller passing under her own will dated 24th January, 1907, on her death on the 26th January, 1920, to ascertain the rate of estate duty to be charged on both said properties, but that each of said properties should be treated as separate properties under the provisions of sect. 12, sub-s. 2, of the Finance Act, 1900, and sect. 16 of the Finance Act, 1907. If the property the subject of the general power of appointment was—1, settled property passing on the death of Georgiana A. E. Dunbar-Buller under George Dunbar's will, who died before 2nd August, 1894, it should not be aggregated; if it was not, it should.

Under George Dunbar's will the property was settled on Georgiana for life, and after her death for her sons and daughters as therein, with remainder to such uses as Georgiana should by will or codicil appoint, and in default of appointment over. In *In re Gordon and Adams' Contract* (1) the Court of Appeal (overruling Eve J.) said:—"There is an important distinction between general and particular powers in this respect. The donee of a general power is virtually absolute owner of the property over which the power extends, and he is to be considered as absolute owner for the purpose of considering the rule against perpetuities. A special power must be read into the instrument creating it, but that cannot be treated as applicable to general powers. The position would be different if an antecedent estate had been kept alive; but if there is an estate unincumbered in the sense that the person exercising the general power can do what he likes with the property, he is in the position of an owner, and the settlement is at an end."

Now, Georgiana exercised this general power by her will dated 24th January, 1907. By the Wills Act, sect. 24, a will is construed with reference to the real and personal estate comprised in it, including property disposed of by the will under a general power of appointment (sect. 27), as if it had been executed immediately before the death of the testator, and it passed all property, real and personal, which at the time of the death the testatrix had power to dispose of. In this case Georgiana exercised her volition, and executed this will, and thereby immediately before her death put an end as and from the time of her death to all the limitations in the will of George Dunbar in default of appointment by her. It seems to me that at her death a failure of issue had occurred, and at the same time her will spoke in accordance with the appointments validly made therein, and on her death this property passes under Georgiana's will, within the meaning of the Finance Acts, and not under the will of George Dunbar. I cannot imagine that there was any fraction of time in which on her death the property passed, subject to the remainders in George Dunbar's will in default of appointment. But it is said that the contrary has been decided by the Lord Chief Baron and Mr. Justice Kenny in *Magan's Case* (2).

(1) [1914] 1 Ch. 110.

(2) See post, p. 208.

Wilson J. 1922.

In re DUNBAR-BULLER.

In that case the property was settled by the will of Elizabeth G. Magan on trust for her daughter Augusta for life, then for her issue, and in default of issue to such person as Augusta by her will might give and bequeath the same. An annuity was charged on the whole estate for one Thomas Elders for his life, and an ultimate remainder in fee in default of appointment was given to the daughter Augusta. It could, therefore, be dealt with by Augusta's will either as absolute owner or by appointment. Augusta by her will devised and bequeathed all her real and personal estates as therein, and ended by saying: "I make this will in pursuance of the power contained in my mother's will, and of all other powers and authorities whatsoever." She died on 20th October, 1905. The Chief Baron first considered whether Augusta's will passed the property under the power in her mother's will or under the absolute devise to herself, and he apparently came to the conclusion that it passed by the exercise of the power of appointment, and he read that appointment, though a general power of appointment, into the mother's will. It may have been quite right to do so in that case, owing to some antecedent estate or incumbrance, such as Elders' annuity under the mother's will, being in existence. He then goes on to say that the real question is whether the property was, on the death of Miss Augusta Magan, settled property—i.e., whether on her death it was limited to or in trust for any persons by way of succession; and he says up to the moment of her death it was settled on her for life, and then for her issue, but at the moment of her death the possibility of issue ceased, and no one could take but herself, and from the moment of her death it ceased to be settled.

He then decides that it was not settled when it passed from Miss Magan at the moment of her death. This portion of his judgment only shows that the remainder to the issue of Georgiana after her life estate had ceased on her death, and before the estate passed from her on her death. If the property was not settled, it was immaterial under which will it passed. In the chapter on this subject in Halsbury's Laws of England, *Magan's Case* (1) is cited as an authority for the proposition that on Augusta's death the property was not settled. I think this is accurate, and that *Magan's Case* (1) does not decide the point in this case, and I have come to the conclusion that the property here passed on Georgiana A. E. Dunbar-Buller's death, within the meaning of the Finance Acts, under her will, and not under the will of George Dunbar, and that the Commissioners were right in saying that the properties must be aggregated.

The petition will therefore be dismissed, but in the circumstances I do not think it is a case for giving costs.

Solicitors for the petitioners: *Crawford & Lockhart.*
Solicitor for the Ministry of Finance: *J. H. B. Gunning.*

M. G. E.

(1) See post, p. 208.

NOTE.

K. B. Div. 1908.

May 15.

In re MAGAN.

IN RE AUGUSTA MAGAN.

The following judgments were delivered by the King's Bench (Palles C. B. and Kenny J.) on 15th May, 1908:—

PALLES C.B.:—

The question which has been argued is whether in ascertaining the estate duty payable on the death of Miss Augusta E. Magan, who died on the 26th October, 1905, the property which was subject to a general power of appointment contained in the will of her mother, Mrs. Elizabeth Georgiana Magan, of which she was the donee, is under sect. 4 of the Finance Act, 1894, to be aggregated with the individual property of the deceased.

The answer to this question depends upon two matters: 1, whether at the death of the deceased the property subject to the power was or was not "settled" property under the will of her mother, Elizabeth Georgiana Magan; 2, whether, if so, it then passed by that will, which was a disposition made by a person who died before the commencement of part 1 of the Finance Act, 1894. Were it so settled, and if at the death of Miss Augusta E. Magan it passed by her mother's will, then sub-s. 2 of sect. 12 of the Finance Act, 1900, directs that it shall not be aggregated with the property of the deceased.

The property, the subject of the power, consisted of realty and personalty to a large amount. It was devised and bequeathed by the will of Elizabeth Georgiana Magan, the mother of the deceased, upon trust, as to the rents and annual proceeds thereof for her daughter, Augusta E. Magan, the deceased, for her sole and separate use for life; and, in the event which has happened of default of issue of her, the realty and the capital of the personalty, subject to such life interest, was by the will directed to go "to such person or persons as my said daughter shall by her last will and testament give and bequeath the same." The testatrix then proceeded to charge an annuity to one Thomas Elders for his life on all her property, and appointed her said daughter sole executrix and residuary legatee. There is in this will, especially in the charge of the annuity, such a blending together of the realty and personalty as, in my opinion, shows that the last gift, i.e., that to her daughter as "residuary legatee," captured and included the undevised realty as well as the residuary personalty. Thus, Miss Augusta Magan, at the time of the execution of her will, had a power of appointment over the property in question contingent upon there being a failure of her issue, and had, in herself, in the same event, subject to her life estate, the remainder in fee in the realty, and the absolute interest in the personalty.

By her will dated the 15th January, 1881, Augusta Magan left to the person or persons who should be her heir or heirs-at-law at her death all her real, freehold, and chattel real estate, with an immaterial exception; and after bequeathing certain legacies, bequeathed the residue of her personal estate to her executors upon certain charitable trusts unnecessary to be stated, and concluded her will in these words, "I make this will in pursuance of the power contained in my mother's will, and of all other powers and authorities whatsoever." Miss Augusta E. Magan died without ever having been married.

I shall take first the question whether, upon the death of Miss Magan, the property passed under the power contained in her mother's will or under Miss Magan's devise.

It has not been and it could not be contended that this will would not have been sufficient to effectually execute the power had not the testatrix the estate in default of appointment; but it is, of course, also admitted that, had there not been any such power, the estate would have passed under the devise. The question whether, under such circumstances, the estate passed under the power or under the devise is one as to which in ancient times there was a difference of opinion, but that difference had long since ceased to exist. The matter is learnedly discussed by Lord St. Leonards in his work on Powers, chapter 3, section 5. He says:—"In Sir Edward Clere (6th Reports, 17 b), upon a feoffment by a person seised in fee to such uses as he should appoint by will, it was settled by all the Judges of England, after great consideration, that by operation of law the use vested in the feoffor, and he was seised of a qualified fee (that is to say) till declaration and limitation were made according to his power; and, secondly, if in such case the feoffor by his will limit estates according to his power reserved to him on the feoffment, then the estates shall take effect by force of the feoffment and the uses directed by the will, so that in such case the will is but declaratory; but that if he devised his land without reference to his authority there it should pass by his will, for the testator had an estate devisable in him, and a power also to limit the use, and he had an election to pursue which of them he would."

Thus, the real question for determination is whether the property was, on the death of Miss Augusta Magan, "settled" within the meaning of sect. 12, sub-s. 2, of the Finance Act, 1900.

Now, sect. 1 of the Finance Act, 1894, divides all property into two categories, "settled" and "not settled"; and by sect. 22, sub-s. 1, "settled" property means property comprised in a "settlement"; and "settlement" is by the same sect. 22, sub-s. 1 (i), defined as "any instrument, whether relating to real property or personal property, which is a 'settlement' within the meaning of sect. 2 of the Settled Land Act, 1882, or if it related to settled property would be a settlement within the meaning of that section." Then, the Settled Land Act, 1882, by sect. 2, defines "settlement" by words which, so far as they are material here, are in substance "any instrument under or by virtue of which any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession." Those capable of taking are by a word in the plural, "persons," so

K. B. Div. 1908.

In re MAGAN.

Palles C.B.

that a plurality of persons who may take is essential to the property being "settled" within the meaning of this sect. 12, sub-s. 2, of the Finance Act, 1900. This seems not only to be clear upon the words of the Act, but has been the subject of consideration by one whose every word on such matters carries with it immense weight. I refer to Lord Justice Stirling.

In *In re Pocock and Prankerd's Contract* (1) a question arose as to real estate, which stood limited to trustees upon trust for a married woman for life, for her separate use, with remainder to such uses as she should by will appoint, and in default to the use of herself in fee. The question was whether the equitable tenant for life had power to sell under the Settled Land Act, 1882. Lord Justice Stirling there stated that he had a difficulty in adopting the view that that will was a "settlement" within the meaning of that Act. "It is, no doubt," he says, "an instrument by which the land stands limited or in trust for one and the same person for various estates and interests by way of succession; but what the section deals with is an instrument under which land stands for the time being to or in trust for any persons, being more than one, 'by way of succession.'" It is true that that case can hardly be regarded as an actual decision upon the question here, because the Lord Justice held that under other sections of the Act the married woman had power to sell the lands; but the view expressed by the Lord Justice has, so far as I am aware, never been dissented from. However this may be, I am quite prepared to decide on principle on my own authority, that there must be a plurality of persons who may become entitled in succession to the property to bring it within the definition of "settled."

Now, as long as Miss Magan was alive, notwithstanding her age, and the fact that she had never been married, the law contemplated the possibility of her having issue. Her issue, had there been such, would have taken under the will of her mother, Mrs. Elizabeth Georgiana Magan, and therefore during the life of Miss Augusta Magan, and up to the moment of her death, the property in my view was "settled" within the meaning of the Finance Act. But at the moment of her death the possibility of there being issue ceased. At and from that moment no person could take under the mother's will save Miss Magan herself; and therefore I hold that, upon and from the moment of her death, the property ceased to answer the description of being "settled." Thus arises a question of some nicety: was the property "settled" when it passed from Miss Magan at the moment of her death? I am of opinion that it was not. The two events—death and the passing of property—took place, in point of time, at the moment; but in nature one preceded the other. The passing of the property was the effect of the death; the death was the event upon which it passed, and in nature the event must precede the effect which is to ensue upon it. This is so, not only metaphysically, but it is a recognized principle of our law. Some of the cases in reference to it are usefully collected in Viner's Abridgment: Title, "Instant." Division "A" is headed, "What it is, and in what cases allowable," and says: "1—Instans est unum indivisible in tempore,

(1) [1896] 1 Ch. 302.

quod non est tempus, nec pars temporis, ad quod tamen partes temporis copulantur." In No. 2 it is said: "Every instant is the end of the one time, and the beginning of the other"; and in No. 5, which is in point here, it is said: "In some cases, the law allows a τονόν, as in remitters' freehold descending and occupancy in instanti: but in the acts of the party there must be successive motion."

Then Division "B" is headed, "Instant, considered: How"; and the principle is laid down, taken from Finch's Law, 18 (a): "Priority of time is respected of things done together. An instant is not to be considered in law, as in logic, as a point of time, and no parcel of time; but in our law, things which are to be done in an instant have, in consideration of law, a priority of time in them; as lessee for life makes a lease for years, they both surrender to him in reversion, though 'tis made in an instant, yet shall be understood to have degrees 'scilicet'; the surrender of the lessee for years to tenant for life, and then the surrender of tenant for life."

In Littelton, sect. 287, the well-known rule that a joint tenancy cannot be severed by the will of one of the joint tenants is put upon this principle. "Also, if there be two joint tenants of land in fee-simple, within a borough where lands and tenements are devisable by testament, and if one of the said two joint tenants deviseth that which to him belongeth by his testament, &c., and dieth, this devise is void and the cause is, for that no devise can take effect till after, 'post,' the death of the devisor and by 'per' his death all the land presently cometh by the law to his companion which surviveth."

Commenting upon this, Coke says: "Here both their claims commence at one instant, and although an instant est unum indivisible in tempore, quod non est tempus, nec pars temporis, ad quod tamen partes temporis connectuntur, and that instans est finis unius temporis et principium alterius, yet in consideration of law there is priority of time in an instant, as here the survivor is preferred before the devisee; for Littleton saith that the cause is that no devise can take effect till after the death of devisor, and by his death all the land presently cometh by the law to his companion; whereby it appeareth that Littleton by these words 'post mortem et per mortem,' though they jump at one instant, yet alloweth priority of time in the instant, which he distinguisheth by per and post."

Considering the instant of the death of Miss Magan upon this principle, the instant so far as it was an end of her life must precede in contemplation of law the same instant so far as it was the time at which the estate passed on her death. I am, therefore, of opinion that although the death and the passing of the estate must be regarded as having taken place at the same instant, which for some purposes must be considered in law as "unum indivisible in tempore," still that indivisibility must be considered to be sub modo only, or, I should prefer to say, is subject to an exception, and at all events is not inconsistent with the termination of her estate preceding the passing of that estate upon her death; that on the termination of her life, and before the passing of the estate upon her death, the possibility of her having issue, and consequently of there

K. B. Div. 1908.

In re MAGAN.

Palles C.B.

being anyone to take in succession to her under the will of her mother, ceased: that the property at the termination of her life ceased to be "settled property" within the meaning of the Finance Act, and consequently was not "settled property" at the time, which must be regarded as subsequent when it passed on her death.

Viewing, therefore, the case with the strictest technicality, I am of opinion that the contention of the Crown is right, and that the estate which passed under the execution of the power must be aggregated with those which passed by the devise. It is not, in my opinion, a case for costs.

KENNY J.—I concur.

IN THE GOODS OF BRADFIELD.

K. B. (S. 1.)
(Probate.)
Dodd J.
1922.
Nov. 3.

Probate—Practice—Grant of administration—Renunciation of right to—Grant to person next entitled—Death of grantee, and grant de bonis non to person who had renounced.

Administration had been granted to a person entitled in distribution on the renunciation of the sole next-of-kin. On the administrator's death the Court gave the next-of-kin leave to retract her renunciation, and to take out a grant de bonis non.

MOTION EX PARTE.

Thomas Bradfield died intestate on the 23rd January, 1921, having been taken out of his house and shot by armed men. His sister and sole next-of-kin, Mary Bradfield, who was living with him at the time, suffered such a shock that her health broke down. She accordingly renounced her right to administration; and on 1st March, 1921, a grant was issued to William Boyle, son of a predeceased sister of Thomas Bradfield. William Boyle died on 16th May, 1922, leaving a considerable portion of the estate of the deceased unadministered. Mary Bradfield now applied, notwithstanding her former renunciation, for a grant de bonis non.

Tobias, for the applicant.

There is a difference between the English and Irish practice. In England such a grant would be made in the office direct (see Tristram and Coote's Probate Practice, 15th edition, p. 227, and the cases cited in note (m)). In Ireland, however, the invariable practice is that application for leave to retract must be made to the Court.

DODD J.:—

I think this is a case in which the applicant ought to be given leave to retract her renunciation, and to take out letters of administration de bonis non to Thomas Bradfield, and I make an order accordingly. She must get her costs of this application out of the assets.

Solicitor: *J. Barry Deane.*

T. C. T.

H. L.
1922.
Nov. 13.

[House of Lords.]

COOPER, Appellant, and GENERAL ACCIDENT, FIRE, and LIFE ASSURANCE CORPORATION, Ltd., Respondents (1).

Insurance policy—Exceptions—Loss of motor car—Riot or civil commotion—Onus of proof—Inference of fact—Power of Court of Appeal to draw inference from proved facts.

The plaintiff insured his motor car with the defendant company. The policy contained an exception of "loss or damage occasioned through riot or civil commotion occurring within the land limits of Ireland." The car was stolen in circumstances, the details of which were not disputed, from which the inference might be drawn that it was taken by insurrectionists to be used in the course of the insurrectionary campaign or by ordinary thieves.

Held, by the House of Lords (affirming the decision of the High Court of Appeal for Ireland, which reversed the trial Judge, the Divisional Court of the King's Bench Division, and the Court of Appeal in Southern Ireland, ante, p. 45), that the proper inference to be drawn from the proved facts was that the loss fell within the exception.

Held, per Viscount Cave C., that if a loss takes place in consequence of civil commotion, it is not necessary to prove a commotion at the actual time and place where the loss happened to bring the case within an exception of loss occasioned through riot or civil commotion.

Per Lord Dunedin: Judges of Appeal are entitled to draw their own inferences where there is no question as to the facts themselves.

Serjeant Sullivan K.C. and *H. D. Conner K.C.* (with them *J. M. FitzGerald*), all of the Irish Bar, for the appellant.

Murphy K.C. and *Murnaghan* (both of the Irish Bar), for the respondents.

At the conclusion of the arguments on behalf of the appellant, counsel for the respondents being present, but not being called upon, their Lordships delivered judgment as follows:—

The Lord Chancellor (Viscount Cave) (2):—

My Lords, this is an appeal by the plaintiff in the action from an order of the High Court of Appeal for Ireland reversing an order of His Majesty's Court of Appeal for Southern Ireland, which had affirmed an order of the King's Bench Division of the High Court of Justice, affirming the judgment of Mr. Justice Moore at the trial. It is worth noting in passing that this is the first instance which has come before your Lordships' House of the working of the judicial sections in the Government of Ireland Act, 1920, by which in the

(1) Before Viscount Cave C., Viscount Finlay, and Lords Dunedin, Atkinson, and Sumner.

(2) The report of the judgments in the House of Lords has been printed from the shorthand notes of Messrs. W. B. Gurney & Sons.

wisdom of Parliament no less than four appeals are competent to a litigant in cases of this kind. The amount involved in this appeal is £250.

My Lords, the facts are these. The appellant on the 7th May, 1920, insured his motor car with the respondent company, who by the policy undertook to indemnify him against loss of or damage to the car by whatever cause such loss or damage might be occasioned, but subject to certain exceptions, one of which was this: "Loss or damage occasioned through riot or civil commotion occurring within the land limits of Ireland." On the 28th October, 1920, the appellant, who lives at Ballinrea, in the district of Douglas, County Cork, returned in the car from Cork and put the car in his garage close to his house; and he describes what then happened in this way: "Between 7 and 8 o'clock that evening I heard what I thought was a car. I went to the back door (from house into yard). I opened it; a voice said, 'Shut that door!' I opened it again; voice again, 'Shut that door!' A third time this happened; all I saw was an arm; it held what might have been a revolver or else a stick." I note that the witness in his statement described the weapon as a revolver. He goes on: "Shortly after I saw car moving off"; and then in cross-examination he said: "No alarm given at all before I heard the noise of the car. I only saw the arm of the man; I never saw the body of the man. Somebody (other than this man) started the car, probably some one or more; but I did not see anything except the one man's arm. Two other cars were taken near me on Monday." In addition to that evidence there was evidence for the defendants, consisting mainly of the evidence of District Inspector Patrick Riordan, who says this: "In October" (that is, the month in question) "five cars in my whole area were taken; one of these was the plaintiff's car; two were from neighbours of plaintiff (only three in Douglas for whole period up to April); motors taken, according to police returns, from 1st October to end of April, in whole City of Cork and rural district, fourteen cars; one car was taken from outside Imperial Hotel in Cork, where it was left in the street during a children's party"; and then he adds: "There is a state of guerilla warfare in parts of Cork county and in the City of Cork (this does not apply to Douglas, or to five or six miles round). The combatants largely avail themselves of motors in their attacks on police and military."

Now, on those facts a claim was made under the policy; and it was disputed by the insurance company on the ground that the case fell within the exception of loss occasioned through riot or civil commotion. Mr. Justice Moore, who tried the case, found in favour of the plaintiff, and his decision was upheld by the first and second Courts of Appeal, but was reversed by the High Court of Appeal for Ireland, and then came the present appeal to your Lordships' House.

My Lords, the first point taken on behalf of the appellant by Serjeant Sullivan is this, that in order to come within the terms of the exception it must be proved that there has been a commotion or tumultuous assemblage at the time and place where the loss occurred; in other words, that you must look at the nature, and not the purpose, of the act which is proved. My Lords, with great respect to the learned Serjeant, I do not think that is the meaning of the clause.

H. L. 1922.

COOPER v. GENERAL ACCIDENT ASSUR. CORP.

Viscount Cave L. C.

If the loss is occasioned through—that is, if it took place in consequence of—a civil commotion, then it appears to me that the case falls within the exception ; and there is no need to prove a commotion at the actual time and place where the loss happened. The case cited by the learned Serjeant, known as the *Suffragette Case* (1), is quite different; for there had been, as the Courts held, no commotion or disturbance of any kind anywhere; there was nothing but a secret conspiracy giving rise to and resulting in isolated acts of illegality on the parts of certain persons concerned. There had been no commotion, no tumult; and this case, therefore, has no application to the present. Secondly, it was said that in this particular case it was proved that there was no commotion anywhere. I am rather disposed to agree that the word "commotion" implies or connotes something like tumult or violence, or threats of violence ; but if one looks again at the evidence, and notes what is said by the District Inspector, I think there can be no doubt that something amounting to civil commotion, perhaps, indeed, to rebellion, did exist in County Cork within a few miles of this place at the material time. I have read the evidence of the inspector, who says that guerilla warfare existed in parts of Cork county and in the city, and that the combatants largely availed themselves of motors in their attacks on police and military. I am satisfied that that evidence referred, not to the moment of the hearing of the case, but to the month of October, 1920, in which the car was taken. One must add that martial law was proclaimed over the whole of County Cork within a few weeks after this event, namely, on the 10th of December, 1920. There was no cross-examination on these statements of the witness; no doubt, because everybody knew perfectly well that the statements which he made were in accordance with the facts. I think, therefore, that the existence of civil commotion in the neighbourhood of Ballinrea is proved.

Next it is said that the decision of the trial Judge ought to be accepted, and should not be disturbed by the Appeal tribunals. My Lords, of course if there were any question of disputed facts on which it was of importance to see and hear the witnesses, the view of the trial Judge would be of the greatest possible importance. But in this case there is no dispute about the facts ; the facts were admitted, and there was no cross-examination upon them, nor, indeed, are they among the grounds of this appeal. The question is, not what are the facts, but what inference is proper to be drawn from the facts proved; and upon that point, as has been often said, the appellate tribunal is not less competent to judge than the Judge who actually hears the case.

I come, therefore, to the final question—namely, on the facts as proved, is it right to infer that the loss of the car in this case was occasioned through riot or civil commotion? My Lords, the material facts are summarized with great force by Lord Justice O'Connor, who, although he did not formally dissent from the view of his colleagues in the Court of Appeal for Southern Ireland, yet showed clearly by his judgment that, had he been alone, he would have come to a different conclusion. He summarizes the material facts as being—first, "the existence of civil commotion in the district" ; secondly, "the time of the occurrence," namely, 7 or 8 o'clock in the evening; thirdly, "the

(1) *London and Manchester Plate Glass Co., Ltd.*, v. *Heath*, [1913] 3 K. B. 411.

occurrence in the district at about the same time of five motor thefts, two of which were from neighbours of the plaintiff"; fourthly, "the show of force on the occasion"; and, fifthly, "the rarity of the crime of motor stealing before these troubles arose." By "the show of force," I think the learned Lord Justice refers to the fact that when the plaintiff opened his door he was loudly called upon three times to close the door, and was threatened with a revolver or some other weapon—a course which would hardly have been taken by a common motor thief, but might well have been taken by the emissaries of some rebellious force. These facts are referred to by the learned Lord Justice, and the only point is whether it is right and proper to draw from them the inference which the High Court of Appeal for Ireland has drawn. Speaking for myself, I do not feel able to draw from them any other inference. I greatly doubt whether any person in County Cork, or whether any reasonable person anywhere, knowing these facts, would fail to draw from them the inference that this car was taken by emissaries of the rebels for the purposes of the rebellion. I feel satisfied, and I think the Court of Appeal was entitled to infer, that as a matter of fact that was the object and purpose of the abstraction of the car; and, accordingly, that the loss might fairly be said to be occasioned through riot or civil commotion within the land limits of Ireland. I draw that inference without any doubt or hesitation, and therefore I come to the conclusion that the judgment appealed from was right; and in my view this appeal fails, and should be dismissed.

VISCOUNT FINLAY:—

My Lords, I am of the same opinion. This case relates to what is the proper inference to be drawn from facts, the existence of which themselves is really undisputed. The action is on a policy of insurance on a motor car, and the insurance, as appears from the policy set out at page 8 of the appendix, is against loss of or damage to the motor car described in the schedule by whatever cause. That is subject, however, to the exceptions and conditions laid down, and one of these exceptions appears on page 9, just below letter B; it is this: "Loss or damage occasioned through riot or civil commotion occurring within the land limits of Ireland."

In the present case the motor was carried away—that was the nature of the loss—and the defendant company pleaded that that was a loss arising out of civil commotion within the meaning of the policy, and therefore they were not liable. The case was first before the trial Judge, then in the King's Bench Division, and then in the Court of Appeal for Southern Ireland. All these Courts found in favour of the plaintiff, and repelled the defence that the loss was the result of civil commotion. There is another Court of Appeal in Ireland—the Court of Appeal for all Ireland—and on a second hearing in that Court a conclusion was arrived at reversing the findings which had taken place in the Courts below. These findings in the Courts below had been unanimous; but one Judge (Lord Justice O'Connor) in the Court of Appeal had stated very clearly grounds which he not obscurely intimated led him to the conclusion individually that the

H. L. 1922.

COOPER *v.* GENERAL ACCIDENT ASSUR. CORP.

Viscount Finlay.

judgments of the other members of the Court, from which he did not feel himself obliged to dissent, were erroneous.

The case now comes before your Lordships' House, and your Lordships are asked to reverse the findings of the Court of Appeal for all Ireland, who found that the company had established that the exception applied. It appears to me to be perfectly clear that the Court of Appeal for all Ireland, backed by Lord Justice O'Connor in the Court below, came to the only reasonable conclusion upon the undisputed facts of the case. In the first place, this motor was carried away from the garage, which was within some five miles of Cork; it is clearly established, and is found by the trial Judge, that there was a state of civil commotion at Cork at the time. At the bottom of page 25 of the appendix the trial Judge says: "I found there was civil commotion in Cork City." He is therefore referring to the time when the motor was carried away.

Then, my Lords, the District Inspector proved beyond all question—what appears indeed to have been common knowledge—that there was a state of guerilla warfare in parts of Cork County and in the City of Cork, and that the combatants largely availed themselves of motors in their attacks on police and military. It is a matter of common knowledge that for warfare of this kind the possession of motors is of great service. It is directly established by the evidence in the present case that in earlier times thefts of motors were practically unknown in Ireland, but that there have been a great many in recent years.

Now it is suggested that this motor was taken away for the purpose of being employed in the prosecution of these civil commotions to which the District Inspector referred. The probabilities are very much in favour of it, and to my mind the manner in which the abstraction of this motor was carried out irresistibly suggests that it was carried out by persons who had at their disposal irresistible force, with which they carried it out in a high-handed way, and with no element of concealment at all about what they were doing. The plaintiff himself says at page 23: "Between 7 and 8 o'clock that evening" (it was early in the evening, between 7 and 8 on an October evening) "I heard what I thought was a car. I went to the back door (from house into yard). I opened it; a voice said, 'Shut that door.' I opened it again; voice again, 'Shut that door.' A third time this happened; all I saw was an arm; it held what might have been a revolver or else a stick. Shortly after I saw car moving off." It appears to me to be inconsistent with any probability that that was the action of an ordinary motor thief. The manner in which, instead of endeavouring to carry out the abstraction quietly, he said in a tone apparently of command three times, "Shut that door," when the owner, who was in the house, ventured to take some interest in what was happening in his own garage to his own property, and all the circumstances go to show that those who were engaged in this abstraction must have been acting with some force behind them which made them feel they were masters of the situation, and it appears to be quite inconsistent with the idea that it was any ordinary motor thief who was guilty of the removal of this car.

We have been pressed with the plea that three Courts below have agreed in finding the other way, and that the Court of Appeal for all

Ireland ought not to have reversed these findings. It appears to me that the Court of Appeal for all Ireland merely did its duty in setting these findings aside. They are not concurrent findings upon questions of fact—the facts are not in dispute at all. The question is, what is the reasonable inference? and I cannot myself draw any inference but one, and that is that this motor was taken away not for the purpose of being put on the market. A suggestion has been thrown out that no doubt there was a great demand for motors for purposes of hostilities, and that this motor was taken by some one who knew there was such a market, and wanted to put the motor on the market to sell it to advantage. I think that is not so probable as that the person who took the motor away took it for the purposes of those who were conducting those civil disturbances to which the District Inspector deposed. It really would be a reductio ad absurdum if the rules regulating appeals in such matters compelled the Court to shut its eyes to what is the only rational inference from undisputed facts, and to give a decision which everyone must feel to be erroneous, merely because it has been given in several Courts below. The question really is, what is the most probable inference. You cannot get absolute demonstration in these matters, but all the facts seem to me to make it a great deal more probable that this motor was taken for the purposes of these hostilities than that it was taken by a motor thief.

For these reasons, and for the reasons indicated by Lord Justice O'Connor in what was virtually a dissenting opinion, though he did not formally register his dissent from the judgment given in the Court in which he sat, I am of opinion that this appeal ought to be dismissed.

LORD DUNEDIN:—

My Lords, I think the argument in this case was exceedingly well presented by the learned counsel for the appellant, but they have entirely failed to convince me that the judgment against them was wrong.

As to the first point, that the civil commotion must be something in the nature of a riot existing at the spot where the act takes place, I think that when you have the expression "occasioned through" it means that there must be civil commotion somewhere, and that the act must be an act which is attributable to that commotion, but nothing more.

The learned Serjeant cited the *Suffragette Case* (1), but if that case is narrowly considered, I think it becomes an authority against him and not for him; because the very fact that the learned Judges in that case considered whether or no there was a general commotion shows that they did not think that commotion at the spot where the window was broken was necessary to bring the act within the exception.

Then, when we come to the question of fact, it has been settled again and again that Judges of Appeal are entitled to draw their own inferences where there is no question as to the facts themselves. The case which was cited in the pleadings of *Dominion Trust Co.* v. *New York Life Insurance Co.* (2) in the Privy Council was an illustration of that. The point there was whether a man's death was self-inflicted

(1) *London and Manchester Plate Glass Co., Ltd.*, v. *Heath*, [1913] 3 K. B. 411.
(2) [1919] A. C. 257.

H.L. 1922.

COOPER *v.* GENERAL ACCIDENT ASSUR. CORP.

or by accident, and the trial Judge had held that it was by accident, but the Court of Appeal and the Judicial Committee of the Privy Council held otherwise. Upon the question of what inference ought to be drawn, I confess I have the same certainty, so far as my own opinion is concerned, as was expressed by my noble and learned friend the Lord Chancellor, and I shall add nothing to what he said.

LORD ATKINSON :—

My Lords, I also concur. There is no question here as to the veracity of witnesses. There is no question at all as to the propriety or possibility of impeaching their evidence, and therefore the question to be decided is one of the inference to be drawn from the facts proved and undisputed.

Now, Lord Herschell has well said that where nothing turns upon the facts, the question must be decided on the balance of probabilities. If I am asked myself whether it is more probable that this motor car was taken away by these men in circumstances indicating violence, and that they had force behind them for the common purposes of theft, or whether it was taken away to subserve in some way the purposes of that guerilla warfare which the District Inspector proves was taking place in Cork, I think the evidence leaves one no opening to come to any other conclusion but that it was taken for the purpose of serving the needs of this guerilla warfare, and not for the purpose of a common thief.

I quite agree that it would be really absurd to hold that you must have some civil commotion at the very place where the theft is committed, no matter whether the civil commotion is for the purpose for which the theft was committed or to serve that civil commotion, and to my mind it comes within the words "occasioned by civil commotion." I think the decision appealed from was perfectly right, and I concur with what has been said by my noble and learned friends who have preceded me.

LORD SUMNER :—

My Lords, I agree with my Lord's proposal from the Woolsack, and I have nothing to add that is strictly material, but I would ask leave to say this. It was necessary for the insurance company to prosecute these appeals to such a stage as would result, if they could obtain it, in success, because it is obvious that to them this case is of very great and general importance. To the plaintiff, however, it is only a matter of his motor car, which these men have taken away from him. It is not, of course, the respondents' fault that your Lordships can only be reached from County Cork by so many and long stages, but neither is it the plaintiff's. I cannot help thinking that if the insurance company could see its way to mitigate in some measure the heavy blow which falls upon the appellant in the matter of costs, it would neither be disregarding its own interests nor failing to obtain general approbation.

The order appealed from was affirmed, and the appeal dismissed with costs.

IN RE MARY KEANE, A BANKRUPT.

High Court of Appeal.
1922.
Nov. 4.

Bankruptcy—Practice—Irish Bankrupt and Insolvent Act, 1857, sect. 271—Discretion of Judge—Order to elect—Order for possession.

The assignees appealed to the High Court of Appeal for Ireland (1) from the decision of the Court of Appeal in Southern Ireland (2).

The Court, without calling upon counsel for the respondent, the landlord, dismissed the appeal with costs.

H. J. M'C.

(1) Before ROSS C., MOLONY and HENRY C.JJ. (2) Ante, p. 198.

High Court of Appeal.
1922.

Nov. 27.

BOGGAN *v.* MOTOR UNION INSURANCE CO.

Insurance policy—Exceptions—Riot or civil commotion—Loss of motor car—Theft by armed men.

The defendants appealed to the High Court of Appeal for Ireland (1) from the decision of the Court of Appeal in Southern Ireland (2); and after argument the Court affirmed the order of the Court below.

H. J. M'C.

(1) Ross C., O'Connor M.R., Henry C.J.
(2) Ante, p. 184. Note: The judgment of Ronan L.J. there reported has not been revised by him.

INDEX.

AGREEMENT for payment of lump sum—Accident—Workmen's Compensation Act—Incomplete memorandum—Discretion of County Court Judge to decline to record - - 164
See WORKMEN'S COMPENSATION.

APPEAL, High Court of, for Ireland—Jurisdiction of - - - - - - - 58
See MALICIOUS INJURY. 3.

—— High Court of, for Ireland—Jurisdiction of, in claim for compensation for malicious injury 15
See MALICIOUS INJURY. 1.

—— New case not allowable on - - 137
See MALICIOUS INJURY. 2.

APPOINTMENT—Tenant for life exercising general power of—Aggregation of properties 204
See REVENUE—ESTATE DUTY.

BANKER AND CUSTOMER — Cheque drawn in payment of gambling debt—*Countermand of Cheque—Payment by bank notwithstanding countermand—Liability.*] The plaintiff had a current account in the defendants' bank, which was in funds. The plaintiff drew a cheque on this account in payment of a gambling debt, but prior to its presentation countermanded by telegram payment of the cheque. Notwithstanding the countermand, the defendants subsequently honoured the cheque on presentment. The plaintiff did not sue the payee of the cheque for the recovery of the money, nor did he prove that he could not have recovered from the payee. *Held*, by the Court of Appeal, that the defendants were guilty of a breach of duty as bankers, and that the plaintiff was entitled to recover from them the amount of the cheque. *Reade* v. *The Royal Bank of Ireland, Limited* - - APP. (S.I.) 22

BANKRUPTCY — ARRANGEMENT—Not "reasonable and proper to be executed under the direction of the Court"—*The Irish Bankrupt and Insolvent Act*, 1857 (20 & 21 *Vict. c.* 60), *sect.* 353.] Arranging debtors made a proposal of a composition, which was accepted by the statutory majority of their creditors. The arranging debtors had refused to give certain creditors who opposed the arrangement an inspection of furniture which formed a substantial portion of the estate. No evidence was given of the value of buildings and stock-in-trade, which comprised almost the whole of the rest of the estate, except that of one of the debtors; one of the opposing creditors had offered to buy the buildings for a much larger sum than that at which they were valued in the statement of affairs. There was evidence that the estate generally was undervalued in the statement of affairs. *Held*, that the proposal was not "reasonable and proper to be executed under the direction of the Court" within section 353 of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60). *In re Gaston* - - - - - APP. (N.I.) 179

BANKRUPTCY—PRACTICE—Order for possession—*Irish Bankrupt and Insolvent Act*, 1857, *sect.* 271—*Discretion of Judge—Order to elect.*] The order for possession mentioned in section 271 of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), is consequential upon the order to the assignees to elect. Although the Bankruptcy Judge has a discretion, yet, upon the assignees electing not to take the premises of a bankrupt, there is a prima facie duty upon the Judge to make the order for possession unless good reason is shown to the contrary. *In re Keane* [APP. (S.I.) 198

CASES—*Kirby* v. *Kerry County Council* ([1921], 2 I. R. 388), overruled - - 58
See MALICIOUS INJURY. 3.

CASES—*Rowland* v. *Cunningham* (unreported), applied [102
See PRACTICE—WRIT OF SUMMONS.

—— *Thomas* v. *The Duchess Dowager of Hamilton* (17 Q.B.D. 592), applied - 102
See PRACTICE—WRIT OF SUMMONS.

—— *Valuation, Commissioners of*, v. *Galvin* (unreported), applied - - - 202
See VALUATION.

—— *Westropp's Divorce* (11 A.C. 294), applied 152
See RESTITUTION OF CONJUGAL RIGHTS.

CERTIORARI - - - - - 76, 78
See LOCAL GOVERNMENT—SEALED ORDER.

CHEQUE drawn for gambling debt—Countermand—Payment by bank—Liability 22
See BANKER AND CUSTOMER.

CIVIL COMMOTION—Theft of motor-car by armed men—Whether - 184, 222
See INSURANCE POLICY. 2.

CONTRACT—Memorandum in Writing 159
See SALE OF GOODS.

COUNTERCLAIM—Costs of—Principle of taxation - - - - - - 105
See PRACTICE—COSTS.

COSTS—Postmaster-General successful in claim for malicious injuries—Entitled to 12
See MALICIOUS INJURY. 4.

CRIMINAL INJURY.
See MALICIOUS INJURY.

DESERTION—Disobedience to a decree of Irish Court for restitution of conjugal rights—May be - - - - - - 152
See RESTITUTION OF CONJUGAL RIGHTS.

GATE—Erection across passage—Right of way—Obligation of dominant owner to close 1
See WAY, RIGHT OF.

EXCEPTION from insurance policy of loss arising from riot or civil commotion
[38, 43, 45, 184, 214, 222
See INSURANCE POLICY. 1 and 2.

1. **INSURANCE POLICY — Exceptions** — *Loss of motor-car—Riot or civil commotion—Onus of proof—Inference of fact—Power of Court of Appeal to draw inference from proved facts.*] The plaintiff insured his motor-car with the defendant company. The policy contained an exception of "loss or damage occasioned through riot or civil commotion occurring within the land limits of Ireland." The car was stolen in circumstances, the details of which were not disputed, from which the inference might be drawn that it was taken by

INSURANCE POLICY—*continued.*

insurrectionists to be used in the course of the insurrectionary campaign or by ordinary thieves. *Held*, by the House of Lords (affirming the decision of the High Court of Appeal for Ireland, which reversed the trial Judge, the Divisional Court of the King's Bench Division, and the Court of Appeal in Southern Ireland, ante, p. 45), that the proper inference to be drawn from the proved facts was that the loss fell within the exception. *Held*, per Viscount Cave C., that if a loss takes place in consequence of civil commotion, it is not necessary to prove a commotion at the actual time and place where the loss happened to bring the case within an exception of loss occasioned through riot or civil commotion. Per Lord Dunedin: Judges of Appeal are entitled to draw their own inferences where there is no question as to the facts themselves. *Cooper* v. *General Accident, Fire, and Life Assurance Corporation, Ltd.* K.B.D. APP. (S.I.), [H.C.A.I., H.L. 38, 43, 45, 214

2. **INSURANCE POLICY — Exceptions** — *Riot or civil commotion—Loss of motor-car—Theft by armed men.*] The plaintiff insured a motor-car with the defendant company against loss or damage by fire, burglary, housebreaking, or theft. An exception in the policy provided that the insurers were not liable for "loss or damage arising during (unless it be proved by the insured that the loss or damage was not occasioned thereby) or in consequence of . . . riot, civil commotion, military or usurped power." While the car was out on hire in Co. Wexford in November, 1920, the owner's chauffeur was held up by three or four armed men, who blindfolded and removed him, and took away the car. According to the evidence, there was no disturbance or civil commotion in the county at the time. The police had, however, been called in from a few outlying stations; motor-cars had been "commandeered" and not returned, and receipts given in three cases; a post office motor-cycle had been taken; there had been some raids for shot-guns and for mails; and early in January, 1921, martial law was proclaimed in the county. *Held* (O'Connor L.J. dissenting), that what occurred was not a riot within the meaning of the policy; that it was simply a theft with violence. *Boggan* v. *Motor Union Insurance Co.*
[APP. (S.I.) 184; H.C.A.I. 222

INCOME TAX—Deduction of, from rent 28, 82,
See REVENUE—INCOME TAX. [169

INFERENCE OF FACT—Power of Court of Appeal to draw - - - - 45, 214
See INSURANCE POLICY. 1.

LEASE OR LICENCE—Restaurant rooms hired for entertainment - - 5
See NEGLIGENCE.

LOCAL GOVERNMENT — SEALED ORDER — Within jurisdiction, final — *Certiorari — Pensionable officer — Resignation or dismissal—Right to allowance — Dispute—Jurisdiction of Local Government Board—Local Government (Ireland) Act*, 1919 (9 & 10 *Geo.* 5, *c.* 19), *sect.* 8.] Decisions given by the Local Government Board for Ireland within their jurisdiction are final and without appeal, and no Court can set them aside on the ground that they are wrong either in matters of fact or matters of law. A Court will not set aside a valid legal order merely because the person who has obtained it may be unable to make use of it. *R.* (*Corporation of Limerick*) v. *Comerton and the Local Government Board for Ireland* - - APP. (S.I.) 76, 78

MALICE—Compensation for damage done by military in carrying out lawful orders [137
See MALICIOUS INJURY. 2.

1. MALICIOUS INJURY — Appeal — *Compensation—Jurisdiction of the High Court of Appeal for Ireland*—10 & 11 *Geo.* 5, *c.* 67, *s.* 43.] In applications for compensation for malicious injury, the High Court of Appeal for Ireland has jurisdiction to hear and determine appeals from the Courts of Appeal in Southern and Northern Ireland respectively, under 10 & 11 Geo. 5, c. 67, s. 43, notwithstanding that the County Court (Appeals) Ireland Act, 1889 (52 & 53 Vict. c. 48), s. 8, and Order 59, r. 73, of the Rules of the Supreme Court, 1905, provide that the decision of the Court of Appeal in Ireland shall be final and conclusive. *Leyburn* v. *Armagh County Council* [H.C.A.I. 15

2. MALICIOUS INJURY—Damage done by military in carrying out lawful orders—*Attack by hostile force on police barrack—Counter-attack by Crown forces—Neighbouring premises—Destroyed by order of commanding officer—Malice—Compensation—Grand Jury (Ireland) Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 135—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5.] An attack was made upon police barracks by a large hostile force. A mixed force of military, ordinary police, and special police came to the relief of the barracks. The relieving party on their arrival at once attacked, and in the course of the fight certain premises were set on fire, and destroyed by order of the military officer in command of the relieving force. The owner and tenant of the destroyed premises applied for compensation. *Held*, by the High Court of Appeal for Ireland (reversing the Court of Appeal in Southern Ireland), that as the damage was done by the military in carrying out the lawful orders of the commanding officer, the necessary element of malice was eliminated, and compensation could not be recovered; also that the liability of the county was strictly limited by statute, and ought not to be extended beyond those limits. Per Sir John Ross C.: The county is not to be treated as a tort-feasor at common law. Compensation was intended to be given by the Criminal Injury Code only in a case where the injury was of a criminal nature; the county was to be liable for the primary acts only, and not for consequential acts, which may not be criminal at all. Per Andrews L.J.: An applicant should not be allowed to make on appeal a new case, and one inconsistent with that made by him at the hearing before the Judge of Assize. *M'Knight* v. *Armagh County Council*; *Smyth* v. *Same* - APP. (S. I.); H. C. A.I. 137

3. MALICIOUS INJURY—Organized robbery—*Compensation—Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5, *sub-s.* 1; *Malicious Injuries Act*, 1853 (16 & 17 *Vict. c.* 38)—*Jurisdiction of High Court of Appeal.*] The High Court of Appeal for Ireland established by the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), sect. 38, is not a substitution for the former Court of Appeal, but is a Court separate and distinct from the Courts existing at the passing of the Act, and with a more extensive jurisdiction than any appellate tribunal that has hitherto existed in Ireland, and consequently is not bound by their decisions. A number of armed men entered a house and took away a gun, revolver, ammunition, and other articles. No chattels other than two hats were injured or damaged. The owner applied for compensation for the articles stolen as well as for damage to the hats. *Held*, that the raid being of the character of an organized robbery, the applicant was not entitled to compensation under the Malicious Injuries Code for the loss of the goods stolen. *Kirby* v. *Kerry Co. Council* ([1921] 2 I. R. 388) overruled. *Leyburn* v. *Armagh County Council* (No. 2) H.C.A.I. 58

4. MALICIOUS INJURY — Postmaster-General—Right to costs—*Telegraph Act*, 1878 (41 & 42 *Vict. c.* 76), *sect.* 11; *Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5, *sub-s.* 6.] Where the Postmaster-General in his corporate capacity successfully applies for compensation under the Malicious Injuries Code for injury to corporate property, the County Court Judge and the Judge of Assize may award him costs. *Postmaster-General* v. *Antrim County Council* - - - - APP. (S. I.) 12

MEMORANDUM IN WRITING—Contract
See SALE OF GOODS. [159

MEMORANDUM OF AGREEMENT—Workmen's compensation—Incomplete memorandum, recording of—Discretion of County Court Judge - - 164
See WORKMEN'S COMPENSATION.

MOTOR-CAR—Loss of, whether occasioned by riot or civil commotion—Exception in insurance policy 38, 43, 45, 184, 214,
See INSURANCE POLICY. 1 and 2. [222

NEGLIGENCE—**Restaurant rooms hired for entertainment**—*Servant of proprietor present to supervise catering — Lease or licence—Dangerous floor—Guest injured—Liability.*] C. hired rooms from the defendants, proprietors of a restaurant, for a whist drive and dance. Only persons invited by C., or who had purchased tickets from her, were admitted to the entertainment. An employee of the defendants was present on their behalf to supervise catering for C.'s guests supplied by the defendants, but C. was de facto in control of the premises during the entertainment. The plaintiff, one of the ticket-holders, while dancing had her heel caught in some linoleum covering the floor. She fell and sustained injuries in respect of which she claimed damages from the defendants. The Recorder of Dublin awarded the plaintiff £50 damages. His decree was reversed by Moore J. on appeal. In stating a case the learned Judge found that the floor was in a dangerous condition. *Held*, that the plaintiff had a good cause of action against the defendants: Per Ronan L.J., on the grounds that the defendants had never parted with their estate, possession, or occupation of the rooms; that they had authorized C. to invite the plaintiff, and that the latter was on the premises in virtue of their invitation. Per O'Connor L.J., on the ground that the entertainment was a joint venture of C. and the defendants, and that both parties were jointly responsible if they failed in reasonable care for the safety of their guests. *Kelly* v. *Woolworth & Co.* [APP. (S.I.) 5

OPTION for tenant to pay all rates, taxes, &c.—Lessor accepting lower rent—Income tax not deductible from lower rent [28, 32, 169
See REVENUE—INCOME TAX.

PENSIONABLE OFFICER - 76, 78
See LOCAL GOVERNMENT SEALED ORDER.

POSSESSION, order for, where assignees of bankrupt elect not to take premises 198
See BANKRUPTCY—PRACTICE.

POSTMASTER-GENERAL—Right to costs of successful claim for compensation for malicious injury - - - 12
See MALICIOUS INJURY. 4.

PRACTICE—COSTS—Counterclaim *identical with defence—Claim dismissed with costs—Counterclaim dismissed with costs—Principle of taxation.*] In an action for the price of goods tendered and refused and for damages for breach of contract the plaintiffs' claim was dismissed with costs, and the defendant's counterclaim for damages for failure to supply the goods was also dismissed with costs. The substantial question on which the defendant succeeded in the defence was the same as that raised by the counterclaim. The Taxing Master taxed the costs of the defendant as if there had been no counterclaim, and gave him the general costs of the action, deducting any costs incurred by reason of and solely attributable to the counterclaim. He gave the plaintiffs only such costs as were incurred by reason of and solely attributable to the counterclaim, and allowed them none of the costs incurred in the action that would have been incurred if there had been no counterclaim. The plaintiffs moved that the taxation of the defendants' bill of costs should be reviewed on the ground that the master should have apportioned the charges which were common to the original action and the counterclaim. The King's Bench Division (Molony C.J., Dodd and Pim JJ.) *held* that the Taxing Master had taxed the costs on correct principles, and refused to review the taxation. On appeal to the Court of Appeal in Southern Ireland, the Court (Ronan and O'Connor L.JJ., Campbell C. having resigned before judgment was delivered) being equally divided, the decision of the King's Bench Division stood affirmed. On appeal, the High Court of Appeal for Ireland (Ross C., O'Connor M.R., and Andrews L.J.), agreeing with O'Connor L.J., affirmed the decision of the King's Bench Division. Where a separate and substantial question is raised by a counterclaim, substantial costs are taxable in relation to a counterclaim, and in such a case there must be apportionment; but where the subject-matter of a counterclaim is substantially the same as the defence or part of the defence, the costs should not be apportioned, and only such extra costs should be allowed as were incurred by reason of the counterclaim. *Crean & Son, Ltd.*, v. *M'Millan* - - - - APP. (S.I.) 105

PRACTICE—WRIT OF SUMMONS—Service out of the jurisdiction—*Or.* 11, *r.* 1 (*e*) *—Order limiting plaintiffs' right to recover at the trial.*] Where it was doubtful whether a case came within the provisions of Or. 11, r. 1 (*e*), the

PRACTICE—*continued.*

Court made an order giving leave to issue writ, and serve same out of the jurisdiction, limiting the plaintiffs' claim to the causes of action in respect of which it should appear at the trial that a writ of summons could have properly been served out of the jurisdiction. *Thomas* v. *The Dowager Duchess of Hamilton* (17 Q. B. D. 592) and *Rowland* v. *Cunningham* (unreported—Irish Court of Appeal, June 24, 1921) applied. Form of Order. *Atkins* v. *Thompson*

[K.B.D. (S.I.) 102

PRACTICE (MATRIMONIAL)—Default of appearance *and answer—Service of summons to fix mode of trial—Or.* 19, *r.* 10; *Or.* 70, *r.* 94.] Where a respondent in a matrimonial cause fails to appear to the citation, the summons to fix mode of trial may be sent to him by registered letter. *Semble*, the order itself may also be sent in the same way. *Bell* v. *Bell* K.B. (MAT.) (S.I.) 103

PROBATE — PRACTICE — Grant of administration—*Renunciation of right to—Grant to person next entitled—Death of grantee, and grant de bonis non to person who had renounced.*] Administration had been granted to a person entitled in distribution on the renunciation of the sole next-of-kin. On the administrator's death the Court gave the next-of-kin leave to retract her renunciation, and to take out a grant de bonis non. *In the Goods of Bradfield*

[K.B.D. (P.) (S.I.) 213

RENT—Deduction of income tax from

[28, 32, 169

See REVENUE—INCOME TAX.

RENUNCIATION — Retraction of — Grant de bonis non - - - - - 213

See PROBATE—PRACTICE.

RESTITUTION OF CONJUGAL RIGHTS — Desertion — *Jurisdiction — Domicile—Foreign subject domiciled in Ireland—Effect of decree.*] The respondent was born in 1880 in the United States of America, both his parents being subjects of those States. At the age of eight he left his native country and never returned there, living at first with both his parents at the Hague, and afterwards with his widowed mother in France. When he was about thirteen or fourteen years of age he went to England, where he received his school and university education, and resided with his mother in Leicestershire. In 1902 he came to Ireland, and resided first in Galway as Master of the Hounds, and afterwards in Kilkenny as Master of the local Hunt. In 1909 he married the petitioner, an Irish lady. The settlement executed on the marriage contained a proviso that it and the

RESTITUTION OF CONJUGAL RIGHTS—*continued.*

rights of parties thereunder should be construed as if the respondent was domiciled in Ireland, and as if both husband and wife were to be domiciled in Ireland for their respective lives. In 1917 the respondent purchased a freehold house in the county of Kilkenny, and he resided in that county with his wife from 1909 until 1921, when he left his wife, informing her that he intended to live with another woman, and stating an address in London as his "permanent residence." After he had left his wife, and before the date of the petition, the respondent conveyed his interest in his freehold house to the petitioner absolutely. On petition for the restitution of conjugal rights: *Held*, that on the facts the respondent had an Irish domicile, and the Court had jurisdiction to give the relief sought, it being immaterial whether the respondent was or was not still a citizen of the United States of America. Semble: In accordance with the principles laid down in *Westropp's Divorce*, 11 A. C. 294, adopted in Parker's Divorce Bill, 1917, disobedience to a decree for the restitution of conjugal rights made by an Irish Court may be held to be desertion, and it is not necessary for the purposes of a divorce bill to prove actual desertion for at least two years. *Bell* v. *Bell*

[K.B.D. (S.I.) 152

REVENUE — INCOME TAX—Deduction from rent—*Contract—Provision for an option—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *sects.* 73 *and* 103—*Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40)—*All Schedules*, *Rules*, *r.* 23.] By lease dated February 1st, 1894, premises were demised by a landlord to a tenant at a yearly rent of £22 "over and above all taxes, rates, charges, and impositions whatsoever (quit rent and Crown rent excepted)." The lease also contained a provision the effect of which was that if the tenant would pay "all rates, taxes, charges, assessments, and impositions of every nature and kind whatsoever assessed upon or payable out of or in respect of said premises by either the landlord or the tenant in respect thereof, whether parliamentary or otherwise, including the whole of the county cess and poor-rate, or any rate struck or levied under the Public Health Acts," the lessor would at all times during the continuance of the demise accept and take from the lessee the yearly rent of £14, instead of the reserved yearly rent of £22. Until 1920 the lessor accepted the rent of £14, and paid landlord's income tax herself. In 1920 the tenant was compelled to pay landlord's income tax, and the landlord refused to accept the reduced rent less income tax. Save in respect of landlord's income tax, the tenant had complied with all the requirements of the provision in the lease. *Held* (re-

REVENUE—*continued.*

versing the Court of Appeal in Southern Ireland), that a unilateral provision for an option such as that in the lease was not "a contract, covenant, or agreement for payment of . . . rent" within the meaning of the Income Tax Acts; that the lessee could obtain the benefit of the option only by complying with all its terms, including the payment of landlord's income tax, and that his right to deduct the tax from the rent could be exercised upon paying the full reserved yearly rent of £22. *Wycherly* v. *Flynn* - K:B.D. 28, 32; H.C.A.I. 169

REVENUE—ESTATE DUTY—Aggregation of properties—Rate of duty—57 & 58 *Vict. c.* 30, *s.* 4; 63 *Vict. c.* 7, *s.* 12, *sub-s.* 2—*Settled property—Tenant for life exercising general power of appointment.*] D. died in 1875, leaving a will whereby he settled certain estates to the use of B. for life, remainder to the use of her children, remainder to such uses as she should by will appoint; and in default of appointment, to the use of H. for life, with remainders over. B. died without issue in 1921, leaving a will by which she exercised the power of appointment given by the will of D. *Held*, that for the purpose of determining the rate of estate duty payable on the property passing on the death of B., the property over which B. had the power of appointment was to be aggregated with the other property passing on her death. *In re Dunbar-Buller* [Wilson J. (N.I.) 204

RIOT OR CIVIL COMMOTION—Loss or damage occasioned through—Motor car—Exception in insurance policy [38, 43, 45, 184, 214, 222
See Insurance Policy. 1 and 2.

ROBBERY—Compensation for organized robbery not payable under Malicious Injuries Code - - - - - - 58
See Malicious Injury. 3.

RULES AND ORDERS—R. S. C., Or. 11, r. 1 (*e*) - - - - - 102
See Practice—Writ of Summons.

—— R. S. C., Or. 19, r. 10 - - - 103
See Practice (Matrimonial).

—— R. S. C., Or. 59, r. 73 - - - 15
See Malicious Injury. 1.

—— R. S. C., Or. 70, r. 94 - - - 103
See Practice (Matrimonial).

SALE OF GOODS—**Contract**—**Memorandum in writing**—*Sale note—Confirmation by contract note—References in subsequent correspondence—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *sect.* 4.] In October, 1920, plaintiffs' traveller, at a business interview with the defendant, gave the latter a sale note of 42 tons of oatmeal subject to the plaintiffs having oatmeal unsold, and offering "six separate deliveries if possible. December and January shipment from mills." This note was not signed by the defendant. Some days later the plaintiffs sent the defendant a contract note confirming the sale note, but with some variation and the insertion of certain conditions, and also an intimation that "if this sale note be retained beyond three days after this date, it will be held to have been accepted by the buyer." In the course of correspondence the plaintiffs wrote altering the deliveries to three. In January, 1921, the defendant wrote to the plaintiffs cancelling "my order for oatmeal"; and subsequently he refused to accept delivery on the ground that he had not signed the sale note, and that there was no completed contract. *Held* (reversing Wylie J.), that the sale note and contract note did not constitute a contract between the parties. Per Dodd J.: There was no memorandum in writing sufficient to satisfy the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), sect. 4. *Russell and Baird, Ltd.*, v. *Hoban* - - - - App. (S.I.) 159

STATUTES—6 & 7 Wm. 4, c. 116, s. 135 137
See Malicious Injury. 2.

—— 5 & 6 Vict. c. 35, ss. 73, 103 28, 32, 169
See Revenue—Income Tax.

—— 15 & 16 Vict. c. 63, s. 11 - - 202
See Valuation.

—— 16 & 17 Vict. c. 38 - - - 58
See Malicious Injury. 3.

—— 20 & 21 Vict. c. 60, s. 271 - 198, 221
See Bankruptcy—Practice.

—— 20 & 21 Vict. c. 60, s. 353 - - 179
See Bankruptcy—Arrangement.

—— 41 & 42 Vict. c. 76, s. 11 - - 12
See Malicious Injury. 4.

—— 52 & 53 Vict. c. 48, s. 8 - - 15
See Malicious Injury. 1

—— 56 & 57 Vict. c. 71, s. 4 - - 159
See Sale of Goods.

—— 57 & 58 Vict. c. 30 - - - 204
See Revenue—Estate Duty.

—— 61 & 62 Vict. c. 37, s. 5 - - 12
See Malicious Injury. 4.

STATUTES—61 & 62 Vict. c. 37, s. 5 58
See MALICIOUS INJURY. 3.

—— 61 & 62 Vict. c. 37, s. 5 - - 137
See MALICIOUS INJURY. 2.

—— 63 Vict. c. 7, s. 12, sub-s. 2 - - 204
See REVENUE—ESTATE DUTY.

—— 6 & 7 Edw. 7, c. 58, Sch. II, c. 9 - 164
See WORKMEN'S COMPENSATION.

—— 8 & 9 Geo. 5, c. 40 - - 28, 32, 169
See REVENUE—INCOME TAX.

—— 9 & 10 Geo. 5, c. 19, s. 8 - - 76, 78
See LOCAL GOVERNMENT SEALED ORDER.

—— 10 & 11 Geo. 5, c. 67, s. 38 - - 58
See MALICIOUS INJURY. 3.

—— 10 & 11 Geo. 5, c. 67, s. 43 - - 15
See MALICIOUS INJURY. 1.

TAXATION OF COSTS of counterclaim—Principle of - - - - 105
See PRACTICE—COSTS.

THEFT of motor-car by armed men—Whether riot or civil commotion - 184, 222
See INSURANCE POLICY. 2.

TRIAL, SUMMONS TO FIX MODE OF—Service where default of appearance to citation - - - - - 103
See PRACTICE (MATRIMONIAL).

VALUATION — Evidence — Valuation of houses in neighbourhood—(15 & 16 *Vict. c.* 63, *s.* 11)—*Appeal to Quarter Sessions.*] The Court of Quarter Sessions in fixing the valuation of buildings in an appeal from the Commissioner of Valuation should not have regard to the valuation of other buildings in the neighbourhood. *Commissioner of Valuation* v. *Galvin* (unreported, Q.B.D., 5th June, 1899) applied. *Commissioner of Valuation* v. *Anderson* - K.B.D. (N.I.) 202

WAY, RIGHT OF—Erection of gate—*Obligation of dominant owner to shut the gate.*] A landowner over whose holding an adjoining owner had a general right of way erected a gate across the passage over which the right existed. There was no intention on the part of the servient owner to derogate from the rights of the dominant owner, but the latter, objecting to the obstruction, left the gate open after he had used the way. The servient

WAY, RIGHT OF—*continued.*

owner, suing by civil bill, claimed damages for the failure and refusal by the dominant owner to close the gate. No actual damage was caused. *Held*, the gate having been erected by the servient owner in the reasonable and proper exercise of his rights in his own property, that an obligation was cast upon the dominant owner to shut it. *Geoghegan* v. *Henry* - - - - APP. (S.I.) 1

WORDS—"Contract, covenant, or agreement for payment of . . . rent" 28, 32, 169
See REVENUE—INCOME TAX.

—— "Reasonable and proper to be executed under the direction of the Court" 179
See BANKRUPTCY—ARRANGEMENT.

—— "riot or civil commotion" 38, 43, 45, 184, [214, 222
See INSURANCE POLICY. 1 and 2.

WORKMEN'S COMPENSATION—Agreement for payment of lump sum—*Injury occasioned by accident—No weekly payment made or agreed upon—Registration—Workmen's Compensation Act*, 1906 (6 & 7 *Edw.* 7, c. 58), *Schedule II, clause* 9.] A workman, aged twenty-nine years, met with an accident arising out of and in the course of his employment which rendered him totally blind. No weekly payments by way of compensation were fixed by arbitration or agreement; but the employer agreed to pay, and the workman, represented by a solicitor, agreed to accept £300 as a lump sum in full redemption, satisfaction, and discharge of all claims under the Act. The employer also undertook to provide him with board and lodging. A memorandum of the agreement omitting the undertaking as to board and lodging was prepared, and the employer applied to have it recorded. The workman was satisfied that the employer would carry out that undertaking. The County Court Judge refused to record the memorandum on the grounds that as it was not an agreement for the redemption of weekly payments it was not recordable at all; that the amount was inadequate; and that the memorandum did not contain the entire terms of the agreement. *Held* (O'Connor L.J. dissenting), that the County Court Judge acted within his discretion in refusing to record the memorandum. *Syron* v. *Kilmartin.* APP. (S.I.) 164

THE END.

BIBL.
LOND.N.
UNIV.